

The Lords of Council and Session and the
Foundation of the College of Justice: a
Study in Jurisdiction

Andrew Mark Godfrey, B.A., LL.B.

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Declaration in terms of Regulation 3.8.7

I declare that this thesis has been composed by me and that it is my own work.

A.M. Godfrey

Abstract

In this thesis the significance of the establishment of the college of justice in 1532 is re-assessed. It was the culmination of a number of institutional reforms to the session which had occurred since the 1520s, and it will be argued that it entrenched the institutional structure of the session as a body distinct from the king's council and conferred upon it a new degree of autonomy. Its jurisdiction was the same as that of the session, but analysis of the judicial decisions of the lords of council and session shows that by 1532 this jurisdiction had expanded when compared with the later fifteenth and early sixteenth century.

By 1513 the king's council and the session exercised a comprehensive jurisdiction which encompassed all civil actions except those which concerned the ownership of land, known as fee and heritage actions. By 1532, however, it had become unknown for council and session to decline jurisdiction in an action over fee and heritage. Correspondingly, the practice of remitting such actions to other courts through lack of jurisdiction seems to have ceased. Disputes over fee and heritage seem to have been resolved increasingly through actions before council and session for the reduction of an infeftment, which type of action had also become more common since the early sixteenth century. Exceptions taken to the competency of council or session deciding upon fee and heritage were now almost entirely in such instances. By 1540, however, such exceptions were otiose because the lords of council and session had come to regard an action for the reduction of an infeftment as the only competent means by which a title to land in fee and heritage could be declared invalid, and regarded such actions as exclusively within their own jurisdiction. Having in practice been obviated for many years, the old jurisdictional restriction thus became obsolete.

By 1532, therefore, the jurisdiction of the lords of council and session had been enhanced, but so too had their involvement in arbitration procedure and the regulation of extra-judicial settlements. Such involvement demonstrates the manner in which private methods of dispute settlement were becoming integrated with the public administration of justice. The "practick" of the lords was also by this time varied and extensive, and the remedies of advocacy, suspension and reduction allowed the lords to review the decisions of other courts of law and to substitute their own determination. The conclusion of this thesis is that with its reconstitution as the college of justice the session effectively assumed the role of a supreme central court.

Acknowledgements

It was exactly seven years ago that my interest in becoming a postgraduate research student and in undertaking research into Scottish history became a conviction that I wished to do so. At the time I was in the final stages of revision for finals in the School of Modern History at Oxford. Subsequently I read for a law degree at Edinburgh University, and had the good fortune to be taught legal history by David Sellar, Hector MacQueen and John Cairns, and six years ago I discussed with Hector MacQueen whether it would be feasible for me to write a thesis on the foundation of the College of Justice and the early history of the Court of Session. It was then through the generosity of Edinburgh University and the Faculty of Law in particular that I was granted a postgraduate studentship for three years and a Gray scholarship, and was able to write this thesis. For this support I shall always be most grateful.

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Introduction:

Jurisdiction and the Central Courts in Scotland 1200-1528

General field of study

Jurisdiction and courts in later medieval Europe

Jurisdiction means power to decide,¹ and the formal expression and instrument of that power is the court. Whilst today the fundamental unit of jurisdiction is the state, in medieval Europe to a greater extent jurisdiction had a significance which was also local and personal. These features were reinforced by the feudal concept of tenurial lordship which developed between the tenth and thirteenth centuries. Jurisdiction over territory implies the power to determine disputes within that territory, but typically in medieval societies jurisdiction was vested unsystematically in a wide variety of persons and offices, the divisions between them having evolved to reflect successive grants of jurisdiction which accompanied grants of land in particular. In Scotland this division of jurisdiction was determined through rules embedded in the common law which emerged by the thirteenth century, and embraced sheriff, barony and regality courts, justice ayres, burgh courts, the church courts, and parliament itself. In this context Alan Harding has commented suggestively upon 'the medieval preoccupation with jurisdiction as the form of political power and with courts as the

¹Peter Cane, *An Introduction to Administrative Law* (2nd edn, Oxford, 1992), p.119.

framework of government...'² and that 'it was in terms of jurisdiction that power was measured in medieval societies'.³ The jurisdictional structure which had emerged in Scotland by the thirteenth century would imply that the measure of power was more to be found in the locality than in central organs of government.

Given that background, any significant alteration in the pattern of jurisdiction within a state assumes a high degree of interest, and the development of royal central courts across Europe by the later fifteenth and early sixteenth centuries can be regarded in that light. In jurisdictional terms, the significance of this may be that it reflects a greater predilection in litigants across Europe to look increasingly to central authorities within their respective states to settle disputes, even in areas previously reserved to other local jurisdictions. Alongside this enhancement of the role of central governmental organs went their entrenchment in more pronounced institutional forms.

This jurisdictional shift towards central authority is but one example of the centralisation which accompanied the growth in the authority of rulers in the later middle ages and which 'replaced the local independence of the early Middle Ages'.⁴ R.C. van Caenegem has gone as far as to suggest that 'the decisive element in this development for both church and state was the establishment of a central court with jurisdiction over the whole of a community or principality'.⁵

In this light, the judicial activity of the royal council in fifteenth and early sixteenth-century Scotland can be seen as part of a common European pattern. This

²Alan Harding, 'Regiam Majestatem Amongst Medieval Law Books', *Juridical Review* (1984), pp.97-111, at p.105.

³Ibid., p.102.

⁴R.C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992), p.100.

⁵Ibid.

is especially so from the 1460s, when judicial sittings of council were organised as 'sessions'. In its widest sense, this European pattern of development was leading to the creation of centralised royal administrations which would be the foundation of the modern state. Indeed, in this wider context, it is worth noting the view of Bernard Guenée, that by the closing years of the fifteenth century, and certainly during the sixteenth century, the word 'state' was 'undoubtedly beginning to acquire its present meaning...of a political body subject to a government and to common laws'.⁶

Conciliar judicial activity was in fact the common vehicle across Europe for the constitution of such central courts. It should be pointed out that of course central courts of one form or another were to be found in countries such as England and France even in the thirteenth and fourteenth centuries. However, those countries also witnessed developments in their central conciliar courts from the late fifteenth century onwards. Scotland is an unusual case, given that it possessed a historically decentralised political character, existing within a unified territorial state. Outside parliament, institutions for administering justice centrally were developed only during the fifteenth century.

Bernard Guenée has attempted to analyse the wider administrative background to these conciliar developments, characterising the eleventh and twelfth centuries as 'the period of the court and the great officers' in royal administration, whilst the fourteenth and fifteenth centuries were 'the age of the chancellor and the council'.⁷ This model points to a fundamental differentiation of the functions of what at one time was a single institution, i.e. the royal court - the *curia regis* - into separate ones in the form of the royal council and royal household. In the course of

⁶B.Guenée, *States and Rulers in Later Medieval Europe*, (Oxford, 1985), p.5.

⁷Ibid., p.122.

the fifteenth and sixteenth centuries, the functions of council itself would be further differentiated, meaning that 'the judicial activity of the council gave way to a new generation of courts of justice'.⁸ Correspondingly, the royal council tended thereafter to exercise a wide governmental competence, but one which was essentially political and now lacking general judicial competence. Scotland was to develop its privy council from the 1540s, Professor Donaldson remarking that 'the differentiation of institutions was complete by the middle of the sixteenth century'.⁹

It was not only in the jurisdiction which they exercised that central courts were significant. They could also provide an enhanced role for professional pleaders and judges, thus increasing the capacity of the law to develop through pleading, judicial decisions and the influence of the medieval *ius commune*. In some parts of Europe, such as Spain and Germany, they could also serve a more overtly political purpose in uniting various lands under a common jurisdiction. Scotland had already developed its common law, dating from the thirteenth century, but there were still political implications to the establishment of a central court within that common jurisdiction. As J.W.Cairns, T.D. Fergus and H.L. MacQueen have noted, 'by the end of the fifteenth century...a central court, the session, was emerging from the regularisation of the judicial business of the king's council, and its reconstitution in 1532 gave it jurisdiction in all civil matters, contrasting with its earlier, relatively limited powers'.¹⁰ Enquiry into the jurisdiction of the king's council and session, the effect upon it of the foundation of the college of justice in 1532, and an assessment of how the earlier limitations fell away, will form the basis of this thesis.

⁸Ibid., p.125.

⁹G. Donaldson, *Scotland: James V to James VII*, (Edinburgh, 1965), p.288.

¹⁰J.W. Cairns, T.D. Fergus and H.L. MacQueen, 'Legal Humanism in Renaissance Scotland', *Journal of Legal History* 11 (1990), pp.40-69 at p.42.

Redress of grievances in parliament to 1425

It is important to remember that parliament and council shared a common origin in the taking of counsel by the king from his greatest subjects in order in particular to dispense justice. The royal council was a 'recognised institution' by 1219, and had probably been so since the late twelfth century, whilst the earliest parliamentary records survive from the 1290s.¹¹ R.S. Rait pointed to the existence of a council under David I and the appearance of the technical term '*curia regis*' by the reign of William the Lion.¹² Parliament was itself merely 'a formal and afforced sitting of the council with a particular judicial competence'.¹³ Writing of the king's council, Hannay remarked that 'as a body of advisers his *consilium* might be of any dimensions from a nucleus of ministers through varying degrees of "general council" to *consilium in parlamento*, where the *curia regis* reached its maximum formality and personnel, with complete competence as a court of law'.¹⁴

'Parliament was the place in which the king and his council heard the complaints and remedied the grievances of the lieges',¹⁵ and evidence of this activity becomes extant in the fourteenth century. Any person could bring a complaint before the king sitting with his council in parliament. However, Hector MacQueen has noted that 'there is evidence to suggest that council also exercised judicial functions outwith its afforced sessions as parliament or council general. It is however possible that these functions were rather more limited than the "common

¹¹A.A.M. Duncan, 'The Central Courts before 1532', in *An Introduction to Scottish Legal History* (Stair Society, Edinburgh, 1958), pp.321-40 at pp.322-3.

¹²R.S. Rait, *The Parliaments of Scotland* (Glasgow, 1924), p.2.

¹³H.L. MacQueen, in 'Introduction' to *The College of Justice: Essays by R.K. Hannay* (Stair Society, Edinburgh, 1990), p.v.

¹⁴R.K. Hannay, 'Early Records of Council and Session, 1466-1659', in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, Edinburgh, 1936), pp.16-24 at p.17.

¹⁵Duncan, 'Central Courts', p.324.

justice" of a parliament or council general'.¹⁶ This 'common justice' refers to parliament's role in hearing grievances which could not be satisfied at common law, and is distinct from and supplementary to its common law jurisdiction.¹⁷ Whilst the ordinary council did then have a judicial function, it seems that access before it was restricted by comparison with parliament.¹⁸ The significance of parliament's role in dispensing justice is apparent from the 1399 statute which 'ordanyt that ilke yhere the kyng sal halde a parlement swa that his subjectis be servit of the law'.¹⁹

We have evidence of parliament delegating its judicial function to committees of its members from 1341 onwards,²⁰ and by later in the century we can be sure of the existence of two sets of 'auditors' exercising these delegated functions - one for 'causes and complaints' and one to consider 'falsed dooms'. However, they did not sit regularly, since they carried out only parliamentary judicial business, and therefore in times of no parliament the only central judicial body was the ordinary council, with its restricted jurisdiction. In 1424, parliament met for the first time in over twenty years, after the return of James I from captivity in England. It is from soon after this point that the history of the session is usually traced, a new body which was now to complement the work of parliament, its auditors and council.

¹⁶H.L. MacQueen, 'Pleadable Brieves and Jurisdiction in Heritage in Later Medieval Scotland' (Edinburgh University Ph.D, 1985), p.254.

¹⁷Ibid., p.252.

¹⁸Ibid., p.264.

¹⁹*The Acts of the Parliament of Scotland*, eds. T. Thomson and C. Innes (Edinburgh, 1882-1914), Vol. 1, p.573 (i.e. *A.P.S.* i, 573)

²⁰*A.P.S.* i, 513.

The origin of the session

The word 'session', meaning simply a 'sitting', was used to describe a number of judicial bodies in Scotland from the fifteenth century onwards. However, the session was settled in form by the mid-sixteenth century. By at least the eighteenth century it had come to be referred to as the 'court of session'. However, within the period 1400-1550 the term denoted successively 'auditorial' sessions, composed of members of the three estates of parliament; sessions of the king's council which concentrated on its judicial work, i.e. 'conciliar' sessions; and from 1532 conciliar sessions held within the framework of the college of justice.

The most important evidence we have for the fifteenth-century sessions is contained in acts of parliament, and in the council records which become extant in 1478. Caution is required in interpreting these acts, since we often know little of their context, and legislation can be only indirect evidence of the activity of these judicial bodies; the existence of a statute providing for a judicial institution to come into being cannot provide evidence of how the institution functioned thereafter, or whether it functioned at all. To examine these acts in serial fashion may give an impression of unity, perhaps even of the 'rise' of a supreme central court, which would be misleading, by conferring upon the legislation what A.A.M. Duncan called a 'spurious air of unity' in the context of his discussion of the legislation of James I generally.²¹

The general pattern of development revealed in these statutes is a shift from parliament in the fourteenth century to council by the early sixteenth century as the main central forum for the administration of justice. During the fifteenth century, it

²¹A.A.M. Duncan, 'James I, 1424-1437', *Glasgow University Scottish History Department Occasional Papers* (2nd edn, 1985), p.1.

appears, various expedients were tried in order to process the flow of complaints which was being directed into parliament, and the first sessions were set up to enable such complaints to be heard independently of sittings of parliament or council. Justice had otherwise been provided for at common law through procedure by brieve and inquest in the ordinary courts of the sheriff and justiciar in particular. Since the emphasis in the fourteenth and fifteenth centuries was on justice administered in the localities, resort to parliament is likely to have been exceptional. The transition by the mid-sixteenth century is therefore all the more remarkable, since by then not only had parliament largely abandoned its judicial functions, but central justice was administered by the session, by then established as the college of justice. The session came to assert exclusive jurisdiction in matters such as fee and heritage which had formerly been outwith the ordinary competence of council at common law.

Scope of thesis

The purpose of this thesis is to examine the role which the session played in the administration of justice in Scotland during the reign of James V. The session had become in essence a judicial sitting of the king's council by the 1490s. Most of the judicial business transacted previously by parliament was now brought before it. On that basis, the council and therefore the session exercised a wide judicial competence and was the institution with almost exclusive responsibility for the central administration of justice from the 1490s onwards. In the mid-1520s, however, administrative reforms were undertaken by the lords of session, and these culminated in the foundation of the college of justice in 1532. Some of the distinctive features of the college of justice can be seen to address directly concerns which had underpinned some of those earlier reforms of the 1520s.

The foundation of the college of justice has usually been assessed in terms of diplomatic or fiscal policy, in which fields its primary significance is often seen to lie. Insofar as it affected the administration of justice or government, it is usually deemed to have been of little or no importance. One of the purposes of this thesis is to examine such interpretations with reference to the conduct of business in the session, and the effect upon it of the foundation of the college of justice.

The institutional history of the session and the college of justice has been charted in a number of seminal works by the late R.K. Hannay, in particular his study entitled *The College of Justice*, first published in 1933.²² Hannay's work has yet to be superseded, but has been supplemented by a number of doctoral theses by Dr. A.R. Borthwick, Dr. T.M. Chalmers, and Professor H.L. MacQueen.²³ Aspects of these theses have been published in various articles and books,²⁴ and the history of the session has received attention as well in theses on the reign of James V by Dr. W.K. Emond and the late Dr. J.S. Cameron.²⁵

Hannay was able to demonstrate that the institution of the college of justice did not replace the session *de novo*, but was grafted onto it, and retained most of its

²²R.K. Hannay, *The College of Justice* (Edinburgh, 1933), now re-issued as *The College of Justice*, ed. H.L. MacQueen (Edinburgh, Stair Society, 1990). See also 'On the Antecedents of the College of Justice', *The Book of the Old Edinburgh Club* XI (1922), pp.87-123, reprinted in *College of Justice*, ed. MacQueen, pp.179-215; 'Introduction' to *Acts of the Lords of Council in Public Affairs 1501-1554*, ed. R.K. Hannay (Edinburgh, 1932), pp.v-lviii; 'On the Foundation of the College of Justice', *Scottish Historical Review* (1918), vol. XV, pp.30-46.

²³A.R. Borthwick, 'The King, Council and Councillors in Scotland c. 1430-1460' (Edinburgh University Ph.D., 1989); T.M. Chalmers, 'The King's Council, Patronage and the Governance of Scotland 1460-1513 (Aberdeen University Ph.D., 1982); H.L. MacQueen 'Pleadable Brieves and Jurisdiction in Later Medieval Scotland' (Edinburgh University Ph.D., 1985).

²⁴A.R. Borthwick, 'Montrose v. Dundee and the jurisdiction of the Parliament and Council over fee and heritage in the mid-fifteenth century' in *The Scots and Parliament* ed. C. Jones (Edinburgh, 1996), pp.33-53; H.L. MacQueen *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993).

²⁵W.K. Emond, 'The minority of King James V, 1513-1528' (St. Andrews University Ph.D., 1988); J.S. Cameron, 'Crown-Magnate Relations in the Personal Rule of James V, 1528-1542' (St. Andrews University Ph.D., 1994).

features. 1532 saw consolidation and entrenchment rather than revolution. Hannay was also able to provide a seemingly sufficient explanation of why the college of justice was founded, pointing to the requirements of James V's diplomacy and the need for a pretext to justify ecclesiastical taxation. It is not sought to challenge the conclusions which Hannay drew in this regard, but to explore a variety of other questions which he did not address. In the main, these will relate to examining the way in which the session functioned in the period immediately leading up to and after the foundation of the college of justice in 1532. The extent of its jurisdiction will be assessed, with special regard to whether this encompassed matters of fee and heritage, and whether this position was altered by the foundation of 1532. The wider role of the session as an instrument of dispute settlement outwith the course of formal litigation will also be examined, as well as its ordinary judicial business. Finally, the terms of the foundation of the college of justice will be assessed in relation to their implications for the session. As a result of these investigations, a more detailed picture of the session will emerge, together with an improved understanding of the nature of its jurisdiction. In conclusion, the significance of the foundation of the college of justice will be re-assessed.

Sources and methodology

The principal source for the study of the jurisdiction of the council is the council register, extant from 1478 and contained in the CS 5 and CS 6 series in the Scottish Record Office for the period up to 1542. This source is complemented by the records of the parliamentary auditors of causes and complaints, which are extant from 1466 to 1496, and are in large part recorded in the parliamentary register.²⁶

²⁶published as *The Acts of the Lords Auditors of Causes and Complaints*, ed. T. Thomson (Edinburgh, 1839).

During this period the council register was largely a record of judicial business - administrative business seems generally to have been unrecorded other than in exceptional circumstances, such as the minority of James V. However, all council business was recorded in a single register, be it in relation to the session, exchequer, or general miscellaneous affairs, and whether it related to political, diplomatic, administrative, judicial or financial matters. There were as yet no ancillary records such as minute books, sederunt books or registers for deeds, nor were there separate registers for the different departments of council's business. Everything was set down in the council register, originally known as the books of council, or as the *Acta Dominorum Concilii*.²⁷

The register contains a chronological record of the sittings of the council, commencing with a sederunt or list of those lords present for the sitting. It appears that the business of the day was minuted in chronological order as it occurred. These minutes are formal, and seek to convey only certain essential pieces of information. If a summons has been called, for example, then the names of the parties, the subject matter of the action, the particular issue for decision, and the decision itself are all that are likely to be recorded. A submission made to the lords might be stated in bald form, but the details of any legal argument which may have taken place are rarely even hinted at. The content of the register tends to be procedural in flavour, focusing on the remedies sought for by the parties, rather than the legal basis for the granting of the remedies. In essence they are administrative records which record the proceedings in court, as W.M. Gordon has pointed out.²⁸ Professor Gordon has noted that the typical contents of the register are decrees, protestations, continuations and engrossment of deeds, such as alienations of property, contracts or submissions to

²⁷*Guide to the National Archives of Scotland* (Edinburgh, 1996), p.104.

²⁸'The Acts of the Scottish Lords of Council: Records and Reports', in *Law Reporting in Britain*, ed. C. Stebbings (London, 1995), p.59.

arbitration.²⁹ Dr. A.L. Murray has traced the history of the register, including various projects for its binding and publication, and has discussed its contents in his introduction to the third volume of *Acts of the Lords of Council*.³⁰

After the reign of James V, the central judicial records became more elaborate in structure, the 'undifferentiated register' of the council gradually becoming 'a purely judicial record' of the court of session.³¹ The privy council register dates from 1545, the minute books from 1543, the books of sederunt from 1553, the register of deeds from 1554, and the exchequer register from 1584. It should be noted that some writs and judicial processes survive from the reign of James V as well, but they are fragmentary and incomplete, and add little to the information to be gleaned from the register.

The method of research adopted as the basis of this thesis has been a close reading of the council register over a continuous period selected so as to span the foundation of the college of justice. The period in question is March 1528/29 to May 1534, and has been chosen to provide as extensive period as possible for which the register could be read within the constraints imposed by time. The total number of manuscript pages read is close to 3,000. It was considered that a period of five years was an adequate sample from which an assessment of the business of council could be made. In addition, the extent of any changes in the register or the conduct of council business after 1532 was thought likely to be apparent within such a time-scale. As well as the manuscript council register for the period 1528/29-1534, the published editions of the extant records of the parliamentary lords auditors of causes and complaints and the lords of council between 1466 and 1506 have been studied so

²⁹Ibid.

³⁰*Acts of the Lords of Council Volume III, 1501-1503*, eds. A.B. Calderwood and A.L. Murray (Edinburgh, 1993).

³¹*Guide to the National Archives of Scotland*, p.103.

as to allow an assessment of the nature of the traditional jurisdiction of council in that period, specifically in relation to fee and heritage. The method of research which was adopted involved reading the whole register within the periods in question, and then selecting particular actions relating to subjects such as jurisdiction, fee and heritage, remitting of causes between courts, and arbitration for discussion.

Conventions

Old style dating has been retained, with the year beginning on 25th March. For dates beginning between 1st January and 24th March, a double indication is given to prevent misunderstanding. Money is given in £ Scots and merks Scots. Spellings of names and places has been modernised wherever possible, but quotations from Scots have otherwise been given without any modernisation of spelling. Where reference to an action is made repeatedly within a chapter, the names of the parties are usually reproduced in italics rather than narrating the whole instance. For example, the action raised by the burgh of Wigtown against the burgh of Whithorn becomes *Wigtown v. Whithorn*.

Chapter One

Aspects of Jurisdiction over Fee and Heritage 1466-1506

Introduction

The principal method available by which to assess the attitude taken by the lords of council and the parliamentary lords auditors of causes and complaints to their jurisdiction in questions of fee and heritage is collation and examination of particular decisions touching upon jurisdiction over a given period of time. Chapters Two and Three will apply this method to considering the years 1529-34, chosen so as to straddle the reconstitution of the session in 1532 as the college of justice. However, since little in the way of legal reasoning is ever set down in the record of acts and decreets, it is clear that answering questions about jurisdiction must rely heavily upon inference. The record itself does not contain any systematic account of jurisdiction or even of what was required in order to show that a case concerned fee and heritage and should be remitted to the judge ordinary. Very few decisions reveal their grounds even as clearly as that concerning Sir John Auchinleck in January 1492/93, where it is stated that 'the lordis of Consale decrettis deliveris and declaris that albeit the said Sir Johne Auchinlek allegit the said landis to pertene to him in fee and heretage yit nevertheless our soverane lord his parliament or consale might be jugis thirto as it wes persewit because our soverane lord clamit for the tyme bot the ward of the said landis'.¹

¹*Acts of the Lords of Council in Civil Causes*, ed. T. Thomson (Edinburgh, 1839), p.263 [hereafter ADCi].

Therefore in this chapter the treatment of issues relating to fee and heritage questions in the fifteenth and early sixteenth century records of council and parliamentary auditors will be analysed to provide a point of reference and comparison for discussion of the later period 1529-34. The main purpose of such an analysis will be to clarify exactly what elements were required in order to characterise a case as concerning fee and heritage, insofar as this is possible. Thus a definition of fee and heritage in jurisdictional terms will be arrived at which can explain why particular cases were remitted to the judge ordinary, and this definition can then be applied to the 1529-34 period to test whether the jurisdictional rules had changed at all, in substance or application. Fee and heritage was, of course, a legal concept of great antiquity in Scots law, standing for the heritable title to land. However, by the fifteenth century it seems to have become the practice for jurisdictional reasons to define whether or not an action related to fee and heritage, and it is the tests which were applied to this end with which this chapter is concerned.

In particular, attention will be paid to any reasoning given in decisions on jurisdiction, and to variations in such reasoning as expressed in individual decreets. As already indicated, only cursory mention is ever made in a decret of the reasons for the decision, especially in declining jurisdiction, but by collating all such decisions between 1466 and 1506 it is hoped that some general observations may be made on the attitude adopted in doing so, and the types of action in which jurisdictional questions tended to arise.

Consideration will also be given to the frequency with which litigants tried to deny the jurisdiction of council or auditors to hear a case which was alleged to relate to fee and heritage, and how often such pleas were successful.

Frequency of remits to judge ordinary and declinatory exceptions

The period 1466-1506 has been selected for examination because the records of auditors and council for these years have been published or at least transcribed for future publication, thus enabling a relatively efficient search to be carried out. 1466 represents the first year for which records of the auditors of causes and complaints are extant (this record continues up until 1495; council records become extant from 1478), whilst the council records of 1503-1506 are available in a transcription prepared for a further volume of the acts of the lords of council which was to have been published. Even this does not represent the complete record of business by any means, since lacunae are known to exist where various volumes are missing, or individual folios have been lost or misplaced. However, for most of the relevant period most of the record does survive and provides a suitable sample for an analysis of fee and heritage questions in relation to jurisdiction.

One point to consider first is the frequency with which jurisdiction was declined. Here the record does not always reveal explicitly whether an exception was pleaded, but often merely what must have been the result of such a plea, that the case is to be remitted to the judge ordinary because it concerns heritage. It has to be inferred from this that an exception was pleaded. It is also not entirely clear whether jurisdiction could be declined in such cases only after the pleading of an exception by the defender, or whether the council or auditors would themselves decline jurisdiction *ex proprio motu* and remit the case to the judge ordinary if it became apparent that the decision in question involved fee and heritage. Since the procedural steps in an action and debate leading to them are not usually fully recorded or explained in the record, it is not possible to draw a firm conclusion on

this point. However, general principles of pleading would suggest that it was a matter for one of the parties to contest jurisdiction through pleading an exception.

The cases selected for examination are those which were remitted to the judge ordinary, excluding those where it is apparent that it is the spiritual judge ordinary to whom the case is remitted. Fee and heritage exceptions tend not to be recorded in themselves unless successful, thus being recorded only in passing in the decision to remit. This is the case until the final few years of the period under consideration, when exceptions seem to be recorded in themselves more often. Even in these instances, it is not often recorded whether the exception was successful, although generally they would seem not to have been if a remit to the judge ordinary was not made. A further problem is that sometimes it is a matter of inference whether the reason why a case was remitted was because fee and heritage was involved.

The impression which can be given in academic discussion of this subject is that it is quite common in the fifteenth century to find exceptions of this sort and remits to the judge ordinary. Dr. Borthwick, in referring to fee and heritage exceptions, has stated that 'such a plea would become a commonplace in causes heard by the lords of council',² whilst Professor MacQueen wrote that 'anyone reading the printed records of the *Acta Dominorum Concilii* or of the *Acta Dominorum Auditorum* will quickly become familiar with the remit to the judge ordinary of matters concerning fee and heritage by these bodies'.³ These statements are not in themselves misleading, but they should not be taken to imply that remitting cases to the judge ordinary was a frequent occurrence. In fact, amongst the

²A.R. Borthwick, 'The King, Council and Councillors in Scotland, c. 1430-1460' (Edinburgh University Ph.D., 1989), p.351.

³H.L. MacQueen, 'The Brieve of Right in Scots Law', *Journal of Legal History* iii (1982), p.64.

decisions which have been examined over the forty-year period to 1506 (with more or less continuous records for the latter thirty years) there are only fifty-eight such instances (and one may be unrelated to fee and heritage since it involves the 'impreving' of a 'sett' - i.e. lease). This would suggest an average of only two cases a year, out of hundreds.

As an incidental point, it is worth stating that the relative infrequency of remits to the judge ordinary might suggest that the kind of remedies which litigants sought very rarely related to or depended upon deciding an issue of fee and heritage, and that therefore the fee and heritage restriction was not in practice a very significant one for council in the conduct of its business, although legally and jurisdictionally significant. Given that the restriction itself has been shown to arise from technical developments in medieval Scots law rather than from what would now be called a policy decision based on social or political grounds, care should be taken not to make exaggerated claims for the significance of its existence or its erosion by the 1530s. The pertinent historical question, though, relates to how the application of the rule may have changed over time, and so apart from discussing the frequency of remits from council or auditors to the judge ordinary, consideration must be given to whether there is any trend which is apparent during the period 1478-1506 (it is difficult to assess 1466-1478 since there are no extant council records).⁴

The breakdown of the fifty-eight cases which were remitted is that fifteen arise in records of the auditors of causes and complaints between 1466 and 1495; thirty-two arise in the first volume of acts of the lords of council, from 1478 to 1495,

⁴See Appendix, p.306.

five arise in the second from 1496 to 1501, and one in the third from 1501 to 1503; and five thereafter between March 1502/3 and March 1506/7.

Over the same period it is possible to note the number of unsuccessful attempts to persuade the lords to remit an action in the form of protests or exceptions that the lords are not competent judges to hear an action because it relates to fee and heritage. No such cases arose before the auditors; three cases occur in the first volume of council records, three in the second, twelve in the third; between March 1502/3 and January 1505/6 nineteen cases occur, with a further twelve between November 1506 and March 1506/7.⁵

Identifying remit cases

The cases under discussion are those which resulted in a remit to the judge ordinary. However, it is not necessarily made explicit why the case is being remitted, nor indeed whether it has been remitted. Also, to find such cases the register of decisions has to be laboriously searched, since the index alone does not guide the reader to all relevant instances.⁶ Classifying an action as one which involved a remit to the judge ordinary is not always straightforward. For example, in the case of the abbot and convent of Lindores against Philip Mowbray and others in 1471, the lords auditors do not actually remit the case to the judge ordinary as such, but merely declare that the action 'aw nocht to resort nor be determyt befor thaim becaus it is fee

⁵See Appendix, p.304.

⁶For example, in the index of *Acts of the Lords Auditors of Causes and Complaints*, ed. T. Thomson (Edinburgh, 1839) [hereinafter *ADA*], under the entry for 'Fee and Heritage' there is a list of 'causes concerning Fee and Heritage remitted to the Judge Ordinary, on being incompetent before the Lords Auditors', but only nine out of thirteen such cases in *ADA* are listed there (two further cases taken from auditorial proceedings are printed in a later volume of council proceedings, giving the total of fifteen quoted earlier): the cases of Lord Graham, Henry Wemyss, Andrew Gray and Archibald Auchterlonie on pp.8, 32, 48, 93, are omitted. The last of these is a remit to the judge ordinary but may not have involved fee and heritage.

and heretage'.⁷ We cannot be sure whether there is any significance in the absence of a specific remit to the judge ordinary, but there are two reasons for thinking that there is not and that it should be regarded as a remit case. First, although the record is a formal register of proceedings, there do not seem to be standardised technical forms of expression, use of which is consistent or obligatory, and it may be that in this brief entry the clerk considered that the words already quoted carried the implication of a remit to the judge ordinary. Secondly, whether or not it is recorded that the case was remitted, the determination that it cannot be heard before the auditors because it concerns fee and heritage would mean that *de facto* the only forum where it could now be heard would be before the judge ordinary. On this basis these actions have been counted as ones which were remitted to the judge ordinary.

Another case has been similarly interpreted as involving a remit for the purposes of this survey. It occurred in 1478 and concerned a summons of error raised by John of Petblatho in relation to a brieve of inquest taken out by Thomas Grandison. The lords of council determined that they 'will nocht tak the said mater to thaim because it is fee and heretage to the quhilk thai [are] na Jugis'⁸, but this would seem by analogy to constitute another *de facto* remit to the judge ordinary. Two other cases of a summons of error fall into the same category, one raised by Lord Kilmaurs⁹ and one by Robert Crawford,¹⁰ both in 1480.

For the sake of argument, an action concerning the casting of peat in a moss, the heritage of which was in dispute, raised by John Maxwell against Robert

⁷ADA, p.10. This case is included in the list quoted in the previous footnote, despite no explicit mention of a remit.

⁸ADCi, p.5.

⁹ADCi, p.57.

¹⁰ADCi, pp.67-68.

Charteris, has also been treated as a *de facto* remit to the judge ordinary.¹¹ In effect, the lords of council say that the matter cannot be dealt with until the heritage is decided, and therefore 'referris and delays the determination' of whether the taking of the peat was wrong until the question of the heritage 'be decidit and declarit'. Perhaps the pursuer was trying to get a remedy in relation to a spuilzie of peat, whilst at the same time litigating in another court on the heritage, only to discover that the matter of the heritage had to be determined first. Since the pattern is similar to the cases already described, this is treated as another *de facto* remit case.

A sixth case, William, Lord Ruthven, and spouse against Archibald Preston in 1495, is also categorised in the same way, although in this instance the record shows only that an exception was pleaded alleging that the matter might be referred to the judge ordinary because it concerned fee and heritage.¹² The action in question was raised in 1495 by Lord Ruthven, alleging 'wrangwis spoliacioun' of various livestock from the lands of Cousland. Archibald's 'forspeaker' had protested that anything done by the lords in the matter should not prejudice Archibald, because it concerned his fee and heritage, concluding with a request that the matter might be referred to the judge ordinary. In the first instance, however, the lords go on to hear the action and decide that before they can proceed further Lord Sinclair, Lord Ruthven and Archibald Preston must all prove what manner of possession they have of the mails of the land in question. For this purpose the action is continued to 8th February 1495/96, but there are no extant records of council business between November 1495 and June 1496, and there appears to be no traceable record of such a hearing taking place. We get an insight, though, into what may have occurred, in further proceedings on 30th January, 1498/99, when Lord Ruthven's action of

¹¹ADCi, p.47.

¹²ADCi, p.405.

warrandice against Lord Sinclair came up.¹³ It is stated that the lands of Cousland have now been recovered from Lord Ruthven by Archibald Preston 'be the law'. This could be taken to imply that Archibald Preston did have resort to the judge ordinary to vindicate his claim of fee and heritage over the lands of Cousland. The following day we find Lords Ruthven and Sinclair and other tenants of the land pursuing an action against Archibald for reduction of a decret given by the lords in favour of Archibald on 10th January 1496.¹⁴ In October 1496 there had been a general continuation until 9th January 1496/97, and by 11th January council was sitting, but due to lost folios and undated sittings it is not possible to identify with certainty proceedings relating to 10th January. Even so there is no extant decret relating to Archibald Preston. However, since the action for reduction makes it clear that the decret was given 'anent certane catal takin', it would seem that the issue of possession of mails and spuilzie was decided then, some fourteen months after the original hearing of October 1495 (assuming that January 1496 is taken as referring to 1496/97). An action before the judge ordinary could have taken place in that time. On balance it seems likely that the case was referred to the judge ordinary, especially since we know of an earlier action by Archibald Preston in which Lord Sinclair was ordered to enter him to the lands of Cousland 'eftir the form of our said soverane lordis presentacon'.¹⁵

Apart from these six instances, the other fifty-two cases were identified because they clearly involved a remit to the judge ordinary.

¹³*Acts of the Lords of Council in Civil Causes 1496-1501*, eds. G. Neilson and H.M. Paton (Edinburgh, 1918) [hereafter *ADCii*], p.321.

¹⁴*ADCii*, p.325.

¹⁵*ADCi*, p.82, 6th May 1483.

General trends

It is possible to discern an overall trend in this evidence. It appears that fewer and fewer cases are remitted to the judge ordinary over time, whilst more and more exceptions are pleaded to the jurisdiction of the lords of council over fee and heritage. The implication might be that during the reign of James IV, in particular, council became less inclined to remit a case to the judge ordinary, especially by about 1500, and that in the record traces of this are left in the form of protests and exceptions to the jurisdiction of council which were plainly repelled.

Although some kind of change must be occurring, the analysis just presented is too crude in itself to allow any firm conclusion to be drawn. This is because the figures alone tell us little unless they are broken down to reflect how many fell in particular years. Even then, of course, caution is required in any interpretation because the relative quantity of judicial business in any given year as compared to other years must be taken into account.

For example, we have seen that over the whole period the mean average would be about two cases a year of a remit to the judge ordinary because of fee and heritage. Over half arise in *ADCi*, but this concentration is not out of the ordinary given that this volume covers over half the period under consideration in any case. However, breaking down the years covered by *ADCi*, it becomes apparent that there are dramatic fluctuations in the number of cases so remitted, with as many as nine in 1478 and in 1480, three in 1490, and none in 1492. Also, in years such as 1481 and 1487 there are no extant records, and so it is not possible to take account of any remits to the judge ordinary which there may have been at those times. Furthermore, the very large number of cases remitted in 1478 is the more notable given that

council sat on only thirty-four days that year, compared for example to the sixty-two days it sat in 1492 when no remits to the judge ordinary are recorded.¹⁶ Even to weigh up these figures properly, one would wish to examine the daily proceedings to see how much judicial business was being carried out at given sittings.¹⁷ Moreover, after all these considerations, one must also take into account the sittings of the parliamentary auditors in the same period.

There is no particular difference in kind between the judicial business conducted by council and that done by auditors, and since council effectively absorbed the business of the auditors after 1495 it is necessary to take the auditors' business into account to arrive at a balanced picture of the period 1478-95. In fact, although fifteen cases of remits to the judge ordinary arise in the extant records of the auditors, only four fall in the period 1478-95: two in 1479, one in 1482, and one in 1483. During this time the auditors sat for only eight out of eighteen years, and in any particular year their hearings extended for only about fourteen days, sometimes rising to twenty-five, sometimes falling to below ten.

Combining the figures relating to the forty-seven remit cases found in the twenty-nine year period from 1478 to 1506, thirty-six of them fell in the eighteen-year period covered by *ADCi* and *ADA*. In other words, well over two-thirds of the cases (77%) occurred within the earlier period representing slightly less than two-thirds of the overall period surveyed (62%). Especially given that we possess no records for four years' worth of the earlier period anyway, it seems that *ADCi* and *ADA* contain at least the proportion of remit cases which - on average - one would

¹⁶See Appendix, p.308.

¹⁷Although, since only judicial business seems to be minuted in council in the fifteenth century, it is a fair assumption that if council is recorded as having sat at all, it processed a reasonably predictable daily quantity of such business.

have expected, and it is probably safe to say that they had a higher than average number.¹⁸

This would seem to confirm the possibility that more cases were being remitted in these years than thereafter. However, one is also left with the evidence of the distribution of the remit cases within that period. That evidence shows that the only three years with more than two or three cases are 1478, 1479 and 1480, with nine, four and nine cases respectively. Thereafter there are between one and three cases in any year, or else none. And whereas council business is recorded for thirty-four, forty-six and thirty-two days respectively during 1478, 1479 and 1480, if we look at the period 1501-06 there would seem to be a potentially significant contrast. For a start, there are a mere six remit cases over the six-year period, which is certainly rather below average. However, council was often also conducting business on more than double the number of days that it did in 1478-80, and thereby presumably deciding upon many more cases by comparison. The figures are 80, 79, 48, 81, 92 and 81 days during 1501, 1502, 1503, 1504, 1505 and 1506 respectively.¹⁹

In conclusion, a caveat must be entered that the sample and numbers in question are so small that statistically reliable conclusions cannot be made. However, at a qualitative level, it would seem that there is some reason to think that after 1500, if not for some time before, remits to the judge ordinary had become less frequent in proportion to the amount of judicial business conducted by council.

¹⁸There are no council records for 1481, 1482, 1486 and 1487, whilst in 1483 there are eight months' worth of council records missing, in 1484 some gaps, and in 1485 only one month's worth of records survives. A recent summary of the state of the records, including the existence of a now lost council register from before 1478, volumes thereafter which are now lost, and missing or misplaced folios is contained in W.M. Gordon, 'The Acts of the Scottish Lords of Council: Records and Reports', in *Law Reporting in Britain: Proceedings of the Eleventh British Legal History Conference*, ed. C. Stebbings (London, 1995), pp.57-59. Account has also been taken of the observations contained in A.A.M. Duncan and M.P. McDiarmid, 'Some Wrongly Dated Entries in the Acts of the Lords of Council', *Scottish Historical Review* 33 (1954), pp.86-88.

¹⁹See Appendix, p.308.

This observation should be set alongside the evidence relating to unsuccessful exceptions and protests made against the jurisdiction of council and which did not lead to a remit to the judge ordinary. Up until 1500, there are only six recorded instances of this, whereas over the course of the six succeeding years, 1501-06, there are no fewer than fifty-one such instances. This is a much more clear-cut case of a definite trend, than that of remits to the judge ordinary. There is plainly a substantial increase in the number of such protests by litigants that council is not a competent judge to them in matters of fee and heritage, with seven in 1501, seven in 1502 and seven in 1503. There are nine in 1504, at least eight in 1505, and at least thirteen in 1506.

Of course, even these figures are difficult to interpret. How do we know, for example, that they reflect an increase in the pleading of such exceptions and protests as opposed to the recording of them by the clerks of court? After all, record-keeping habits do not necessarily remain rigid or static over a period of several decades. A comparison of the manner in which such pleas are recorded might suggest an answer to this. However, even supposing that one could not be sure that the increased number of recorded protests reflected directly anything more than a change in record-keeping practice, one would still be left with the question of why the record style had changed with such dramatic consequences, and whether this reflected indirectly that it was now considered important to note such protests when in the past there may have been no need to do so if the whole question of jurisdiction was uncontroversial. At the very least, therefore, is this evidence not indicative of the jurisdiction of council over fee and heritage having somehow become a matter of controversy or dispute?

Therefore the record of protests and exceptions, however exactly it be interpreted, would seem to support the view that some kind of change was underway around 1500, with fewer cases remitted to the judge ordinary, and more litigants protesting about the jurisdiction of council, although to little effect. This interpretation may seem to have even more potential significance given that the 1490s had been a highly significant decade in the evolution of the session. The recording of jurisdictional protests and exceptions may well be an indicator that from the 1490s council and its judicial sessions were providing a more accessible forum in which royal justice could be dispensed, so that people were more likely than ever to find themselves summoned before it. The protests and exceptions may reflect this, as well as that a wider range of cases may have been coming before council, thus provoking protests by defenders who did not welcome the strengthening of this more powerful instrument of dispute resolution, and the possibility that an effective remedy might be granted against them with greater despatch.

Criteria for remitting to the judge ordinary

In the cases which have been identified for discussion, why was the decision made to remit them to be determined before the judge ordinary? More particularly, what criteria determined whether a particular case fell into the class of cases which should be so remitted? There are definite limitations to our capacity to answer these questions using the evidence of council and parliamentary registers up to 1506. By comparison, in the period 1529-34, procedural and especially jurisdictional debate seems to be slightly more fully recorded along with the decision of council which followed. Nevertheless, some inferences can be drawn from the late fifteenth-century evidence.

The reason for remitting a case which concerns us is jurisdictional competence, where the matter being brought before the council is said to be one which pertains to the jurisdiction of another court, and which is outwith the jurisdiction of council itself. The procedure which a party would use was, at the outset of the hearing, after the calling of the summons, to plead an exception declining the jurisdiction of the lords of council in the matter. In medieval Scots pleading, 'an exception was understood as a reason put forward by a defender for not moving to final judgement on the pursuer's claim'.²⁰ In Scots law, the 'exception declinatour' would have matched the canonist category of declinatory exceptions (as distinguished from dilatory and peremptory ones) as being 'against the competence of the judge or the jurisdiction of the court'.²¹

At its simplest level, the register will record the fact that a case was called and the procedural order made by the court as a result - a continuation or decret for example, or the direction that the matter must be entertained in a different forum, thus ending proceedings before council, or auditors. Sometimes all that is recorded is the calling of a case and that it was then remitted to the judge ordinary. In fact, in seven of the fifty-eight cases, there is no reason given why the case is being remitted, and indeed it is a matter of inference that it *had* to be remitted, and that it concerned fee and heritage. More often there will be an explanatory clause relating that the decision has been made, for example, 'because the matter concerns fee and heretage'. However, the decret does not usually record a finding that the lords of council are not competent judges - that is only the case in ten out of the fifty-eight cases.

²⁰H.L. MacQueen, 'Pleadable brieves, pleading, and the development of Scots law', *Law and History Review* iv (1986), p.410.

²¹*Ibid.*, p.411.

Most cases with an explanatory clause explicitly state that in some way it is the existence of a fee and heritage issue which has led the lords to remit them to the judge ordinary, although various different forms are used to express this. For example, twelve cases merely state that the remit is because the case 'concerns' fee and heritage. Another ten state that it is because 'it is fee and heretage', whilst another five state that the declaration of the matter concerns the 'ground right and heretage' or 'tuichis' upon it, and three that the declaration thereof 'depends upon fee and heretage'. In one case we are merely told that 'it is ane mater of fee', whilst in another that it is because the 'intent' of the summons passes upon the ground right.

Clearly, these formulations do not necessarily tell us very much about the reason for the remit, except that, by implication, the action before council or auditors cannot be decided without a determination of some incidental question of fee and heritage. This is suggested in particular by the notion of the action 'concerning' or 'depending upon' fee and heritage. It is also seen more explicitly in six other cases where the remit is made because both parties are said to claim that the lands pertain to them in heritage, for example in a case of wrongful occupation of lands. In another, we are told that the disputation upon the matter contained in the action might exclude one of the parties perpetually from their heritage.

Whilst certain types of action do typically seem to raise a jurisdictional question of this sort, these cases imply that there was no particular set of actions or types of case which were *prima facie* excluded from council's jurisdiction, but rather that any action raised before council or auditors could on the facts be considered to turn upon a matter of fee and heritage, and as such have to be remitted to the judge ordinary. Consideration has been given to the evidence of cases which were so remitted, but another approach would be to examine the actions which council or

auditors did hear in order to assess whether any of them could nevertheless be characterised as fee and heritage, and whether they fit into the jurisdictional model outlined above.

Difficult cases

In this latter respect, there is a revealing series of three hearings which occurs before the auditors of causes and complaints in May and August 1471. On 15th May 1471, William Sinclair of Herdmanstone had his action called concerning the mails of the lands of Kimmerghame and the lords considered an exception proponed by the defenders that the action should not be determined before the auditors because it concerned fee and heritage and should be remitted to the judge ordinary. Because there was also an allegation that some of the auditors were themselves suspect judges, the decision was held over till August.²² On the same day, though, Marion and Margaret Sinclair and their spouses appeared in a concurrent action against William, concerning charters, 'evidentis', reversions and 'arschip' [goods] claimed by Margaret and Marion, which action was also continued till 3rd August.²³ Then on 9th August the auditors referred Marion and Margaret's action to be determined before the judge ordinary 'because it dependis uppon fee and heretage'.²⁴ On the same day, William Sinclair had his action called again (which was against Margaret and Marion) concerning the 'wringwis spoliacion uptakin and withhaldin of the malis of the landis of kyingeame and the miln of the samyn', and his action was also referred to the judge ordinary because 'it is fee and heritage'.²⁵ The charters and evidence claimed by Margaret and Marion related to the lands of Herdmanstone, Carfrae and Pencaitland, Templefield, Polworth and Kimmerghame, and so it is

²²ADA, p.13.

²³Ibid.

²⁴ADA, pp. 15-16.

²⁵ADA, p.15.

plain that the two disputes relate to the same issue. Thus far the course of these actions is within normal bounds. However, what seems to be a surprising turn occurred on 13th August, when William Sinclair complained to the auditors that the earl of Angus, being William's judge ordinary, was 'parciale' to him and suspect of the law.²⁶ The auditors then ordered both the parties and the earl to be called before the king and his council on 4th October 1472 to determine whether the earl was a suspect judge to the parties. What is significant for our discussion of jurisdiction, though, is their decision that 'gif it be considerit and knawin that the erle of Angus is suspect of law to outhir of the partiis that than outhir [sic, i.e. our] soverane lord outhir tak the said principale actiounes befor him and his counsaile and minister Justice thirin or ellis schaw ane uthir unsuspect Juge thirto as plesis his hienes nocht withstanding the decrete and deliverance gevin be the parliament [i.e. the auditors] in the said mater of before'.

This would seem an odd decision in the light of the discussion so far, unless it is taken to include some reversal of the decision that this was a fee and heritage case. It would have been entirely predictable that in these circumstances the council might give a commission to an alternative judge, perhaps a sheriff *in hac parte*, but it seems surprising that the whole matter might otherwise be decided before council itself. After all, exceptions in the action had already been successfully pleaded, and the actions remitted to the judge ordinary, presumably because there was a fee and heritage issue which was outwith the competence of the auditors. Then we find the same actions being referred, at least as one option, to the decision of king and council. This would seem not to square with what we know of the fee and heritage rule. Although Professor MacQueen provides a helpful discussion of these cases in his book, he does not expressly touch on this point.²⁷ A likely type of explanation,

²⁶ADA, p.17.

²⁷H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), p.225.

apart from that the case was not now considered to be fee and heritage, would seem to be that the jurisdiction which would thereby be exercised by council would be its traditional one of dealing with cases specially pertaining to the king, including 'complaintis made apone officiaris forfalt of execucioune of thair office', but that would not seem to allow for the council going on to decide upon a case involving fee and heritage.²⁸ Frustratingly, the history of the action before the council must remain unknown due to its records becoming extant only some years later at the end of the decade. The example certainly suggests a qualification to the view that fee and heritage cases were always outwith the competence of auditors and council.

There is another ambiguous action which came before the auditors in 1479, and then council in 1480, John Newman and others against James Crichton and others. The first action had James Crichton and Agnes Houston being sued by a set of tenants for double taking of mails.²⁹ Both principal defenders claimed in heritage the land occupied by the tenants in question, and so the action was referred to the judge ordinary as concerning fee and heritage. However, on 30th June 1480 we find the same action being brought again before the council. This time, though, it is not remitted to the judge ordinary, but instead is referred 'to the next parliament to be determyt be the auditoris of complaintis'.³⁰

At first sight then this might appear to be a fee and heritage case which, having been remitted to the judge ordinary, was then to be brought back for decision before the auditors. If so, then again this would be hard to reconcile with the jurisdictional model which has been adopted in this analysis. However, it is also stated that this course has been taken 'because the auditoris of complaint of befor in

²⁸To borrow the language of *The Acts of the Parliaments of Scotland*, eds. T Thomson and C. Innes (12 vols., Edinburgh, 1814-75), ii, p.177, c.10 [hereafter *APS*].

²⁹*ADA*, p.8.

³⁰*ADCi*, p.67.

the last parliament had the samyn action befor thaim and remittit it to the Juge ordinar'. This would seem to imply that the council were leaving it to the auditors to determine the summons, including the point whether it should be remitted to the judge ordinary as it was before. Therefore the auditors would not necessarily give final decree on the summons. It was being referred to them not because the summons was one whose substance pertained to their jurisdiction for the giving of final decree, but because they had previously given a decree on the same issue in the case. Perhaps the expectation would be that the case would simply be referred to the judge ordinary again, as happened in the case of a summons of error brought before council by William Stirling in 1498.³¹ This was remitted for a second time to the judge ordinary 'because it was understand be the Lordis that this mater was referrit to the jug ordinar of before and undecidit be him'.

The remit in the Newman against Crichton case is still puzzling, however, because there is some reason to think that it would have been perfectly competent for council itself to have remitted the case back to the judge ordinary. The feasibility of this is suggested by the case of Andrew Gray of Scheves against Patrick Gordon in 1476.³² This was an action for payment, which was finally decided by the auditors, except for a part of the summons which referred to other goods and causes which touched the lands of Scheves. This part was referred to the judge ordinary 'lyke as the lordis of consale did of before' after an act of council had been produced in court. If the auditors could refer a case to the judge ordinary which had already been similarly referred by council, then why could not council simply have referred Newman against Crichton back to the judge ordinary as well? If it was within their jurisdiction to do so, then the referral to the auditors may imply

³¹ *ADCii*, p.175.

³² *ADA*, p.48.

that the option was being retained of having a final determination before the auditors, despite the case being on fee and heritage.

There are also occasional cases where it is hard to see why a fee and heritage exception was not pleaded. On 11th May 1491 we find actions between Katherine Scott, spouse of the late Alexander Home, and Nichol Elphinstone for wrongous occupation of a land and tenement, and between Nichol and Alexander Home, son and heir of the late Alexander Home, for warrandice of a foreland of a tenement in the Canongate³³ (presumably the same tenement was the subject of both actions). The actions were continued, because Alexander alleged that he was in the fee of the land before the making of the alienation to Nichol, implying that Nichol was not properly seised of the land by Alexander's father. Alexander alleged that he had not entered into any heritage of his father since then. It seems he was trying to evade the claim against him for warrandice.

The action came up again before the auditors nine months later on 15th February 1491/92.³⁴ It then becomes clear that Katherine was claiming the land in conjunct fee, whilst Nichol claimed that Alexander's father delivered it to him, and was calling Alexander as son and heir 'to werrand kep and defend to him a foreland of the said tenement'. In respect of the 'preif assignit to the said Alexander to preif that he wes in the fee of the said landis before the alienatioun maid to the said Nichole', Alexander having been 'oft times callit and nocht comperit', the auditors proceeded to judgement, which was that Nichol 'dois wrang in the occupatioun' of the land, and it is to be 'broikit and manurit be the said Katherine eftre the forme of the letters of coniunctfeftment maid to hir thirapon of the date precedand the said

³³ADA, p.149.

³⁴ADA, p.167.

Nicholis charter'. Alexander was to warrant the land to Nichol 'eftir the forme of the said umquhile Alexanderis charter and seising'.

Why was this not a fee and heritage action? Nichol had his charter, Alexander his entry, and Katherine her conjunctfeftment. Surely Nichol and Alexander could have shown competing heritable titles? Nichol was ordered to desist from wrongously occupying the lands, even though he had a charter. It appears that the lords would have looked into the status of the titles and upheld one over the other, presumably by taking the view that the alienation by Katherine's husband was invalid because of the conjunctfeftment. This is puzzling if one assumes that Nichol's charter was for the heritable fee, and thus a competing heritable title. The explanation may be a procedural one, and reflect a decision on Nichol's part to rely on his rights in warrandice, rather than to contest Katherine's title.

Another puzzling case is that of Alexander Stewart of Garlies against Robert Charteris of Amisfield for wrongous vexation of Alexander in his tack of the lands of Pollintre in Galloway³⁵. Charteris alleged that the lands pertained to him in fee and heritage, but the king's advocate alleged that the lands had been annexed to the Crown and that the tack followed from then. In other words, at the root of the dispute were two rival claims to the heritage, although the action had been brought only by someone with a lease of the land. The dispute does not seem to have been characterised as one of fee and heritage, however, since the auditors referred it to the king and his council as a consequence of the allegation of an annexation. Unfortunately, there is no extant record of any further proceedings before council. In some way or other, the explanation may be that the action was perceived to be

³⁵*ADA*, pp.194-5.

related to the king's interests and therefore to be appropriately determined before council.

Nature of remit and ambiguities

It is not clear whether a remit to the judge ordinary was a procedural order which re-directed the summons in its own terms to the court of the relevant judge ordinary, or whether it was simply a way of concluding proceedings before council or auditors with a direction that no remedy could be granted in this forum. In that case, the pursuer would have to have resort to the judge ordinary for the appropriate remedy and raise new process, presumably for fee and heritage matters by raising an action by breve. By the later fifteenth century other forms of remedy might have been used in the ordinary courts. Little is known, however, of proceedings in such courts due to there being virtually no surviving records beyond protocol books and isolated documents. In only one action concerning a remit to the judge ordinary, Lord Graham against William Graham in 1467,³⁶ is there a specific allusion to procedure by breve, when the record states that the action is 'to be decidit befor the juge ordinar be the kingis breifis or other wais eftir the forme of law', but this implies that a new action would have to be raised one way or another. In the Newman against Crichton case we are merely told that it is remitted to the judge ordinary 'thir to be decidit befor him eftir the forme of the kingis lawis',³⁷ whilst in that of John Wemyss against John Anderson and Andrew Anderson in 1480 we are told that 'the lordis remittis the caus knaulage and dissiission thirof to the Juge ordinar'.³⁸

³⁶ADA, p.8.

³⁷ADA, p.94.

³⁸ADCi, p.63.

When an explanation is given of why the remit is made, sometimes more than one reason is given, and this can lead to some ambiguity. For example, in the case of Robert Hamilton, provost of Bothwell, against Alexander Boyle in 1471, concerning multures, we are told that the remit is made 'because it concernys fee and heretage and als it wes allegit be baith the partiis that the lordis was na Jugis to thai'.³⁹ It is puzzling that the auditors seem to have regarded these as separate grounds, when one would have expected the fact that fee and heritage was involved to be itself the reason why the lords were not competent judges in the matter. Surely the reason in this case why the parties could allege that the auditors were not judges to them was most likely to be because the action turned on a question of fee and heritage?

The other example of two apparently complementary reasons being given is the case of James Livingston against Christine Livingston in 1490.⁴⁰ The action concerned wrongous occupation and both parties claimed the land in heritage, producing their respective instruments of sasine. Christine then pleaded her exception alleging that 'it aucht for the caus forsaid be remitt to the juge ordinaire'. The remit was then made 'because the disputacioun thirof nicht exclude ane of the said partiis perpetually fra the heretage of the said landis and als because the disputacioun of the saidis seising concernis the fee and heretage of the saidis landis'. Again, this would seem to represent two ways of saying the same thing, but the 'and als' clause implies some distinction between the two. Perhaps it would be unwise to read too much into such minutiae, especially since the record was made up by clerks who may simply have been trying to bring out to some extent the particular grounds which had been articulated as justifying the decret. On the other hand, it implies some possible vagueness in the understanding of contemporaries of the way the

³⁹ *ADA*, p.21.

⁴⁰ *ADCi*, p.161.

concept of fee and heritage related to the jurisdictional competence of council, and auditors, and why that jurisdictional competence was limited.

Conclusions on evidence of remits

If we were to synthesise a composite model of how an action might run, we have seen how a party might allege that 'the lordis was na Jugis to thaim'⁴¹ or that the action 'suld nocht remain befor the lordis',⁴² because 'it concernit...fee and heretage',⁴³ and how the lords might then discern that since 'the question of the richt dependis apoun heretage'⁴⁴ or 'because the mater dependis apoun the question of the hale heretage betwix the said partiis',⁴⁵ 'thai may nocht of law be Jugis thirto',⁴⁶ because both parties claim the land relating to the dispute in heritage and show their 'lauchful enteres thair apone',⁴⁷ and a decision might seclude either one from their heritage for ever,⁴⁸ and so the case is to be remitted to the judge ordinary 'eftir the forme of law'.⁴⁹

What can be inferred from this about the nature of the jurisdictional limitations upon auditors and council in respect of heritage? First, it does not seem to have been a question of an action being raised in council or parliament which was in itself incompetent. Rather, as has already been suggested, the problem was that any such actions could raise or depend upon an incidental issue of fee and heritage, and therefore the summons raised in council or parliament could not be determined in either forum (although we have also seen occasional cases which do not seem to

⁴¹ *ADA*, p.21.

⁴² *ADA*, p.*123.

⁴³ *ADCi*, p.405.

⁴⁴ *ADCi*, p.22.

⁴⁵ *ADCi*, p.25.

⁴⁶ *ADCi*, p.57.

⁴⁷ *ADCii*, p.258.

⁴⁸ *ADCii*, p.434.

⁴⁹ *ADA*, p.8.

be consistent with this). One could view this as being because the 'complaint' could not be processed without a prior determination of the fee and heritage which depended upon an as yet uninitiated legal process before the judge ordinary. Alternatively, one could see it more simply as the complaint raising additional incidental issues for council and auditors to settle, but which were, in these instances, beyond their competence, because they depended upon fee and heritage.

Secondly, the remit followed from the fact that two competing titles to fee and heritage were in issue. Decisions by council or auditors which would affect the title of one party alone were not necessarily beyond their jurisdiction. This can be demonstrated through examination of cases involving reduction of charters, infestments and instruments of sasine, and retours following from the determination of brieves of succession and of right, for example. Thus, though in effect 'reduction of an infestment would destroy a title to land', this did not necessarily mean that such an action could be characterised as a fee and heritage action.⁵⁰ It is therefore questionable whether the lords could ever have been barred from hearing an action on jurisdictional grounds merely because the action touched heritage, in the sense that a decision on the action would affect a person's claim to be seised of some lands in fee and heritage.

Cases in which council or auditors decide matters which 'touch' heritage

A definition of the fee and heritage restriction which was based on the idea of decisions which would 'touch' heritage in this sense would therefore be too wide,

⁵⁰H.L. MacQueen, 'Jurisdiction in heritage and the Lords of Council and Session after 1532', in *The Miscellany of the Stair Society* ii, ed. W.D.H. Sellar, (Edinburgh, 1984), p. 82. Thus one might question Professor MacQueen's argument in relation to the jurisdiction of Council and Session in 1532-33 that 'doubts as to the lords' jurisdiction to reduce infestments must have arisen because such actions touched heritage'.

and a number of examples can illustrate this. In 1471, the process of a brieve of right, doom, seising, possession and 'all uther thingis folowing uppon the said breif' were reduced by the lords of parliament.⁵¹ The ground of reduction was that the process was 'unlachfully and unordourly procedit because the last court quhen the assiss past and the dome was gevin was within feryate tyme on gude Wednisday in passion woulk'. This action certainly invalidated a title to land and therefore touched heritage, but was nevertheless competent in parliament. The distinction between this and a fee and heritage action proper would perhaps be that in reducing this process no final determination of right was made and so no one was thereby excluded perpetually from their heritage, and no order was made that someone be now infeft in lands. The common law remedy of a brieve of right remained, and the issue in the reduction could be characterised as essentially procedural, in that there was a flaw in the method of determining title but not necessarily in the substantive determination of right. Yet from the point of view of the litigant whose title had been previously upheld by the assise, he has now lost sasine of the lands, even if only until he initiates further process.

In 1478 we find a hearing fixed by the auditors to allow the defender, John Stewart, to 'fals and inpung...civily' an instrument of sasine because 'the notar of the said seising callit Robert Marschiale put in the uther landis in the said instrument of sesing without his consent or sesing gevin of thaim'.⁵² Of course, this does not necessarily tell us very much, since it is not stated that the sasine was of the heritable fee of the lands, as opposed, for example, to a lease. If it related to the fee, though, it would demonstrate another reduction on procedural grounds, with reference to a flaw in the transfer of the land. Again there is no assessment of competing titles,

⁵¹ADA, p.16, Robert Spens v. James and Robert Nory.

⁵²ADA, p.84.

although if John failed to 'impreve' the instrument, the action might then become one relating to two heritable titles.

The classic case of an action which could be taken before council or auditors which 'touched' on heritage but was not characterised as a fee and heritage case was the summons of error, which if successfully proved entailed the reduction of any infeftment given, and all that followed on the retour. Of course, the declaration of a retour and infeftment as null was in itself something which 'touched' heritage, although we have already seen that this kind of reduction might be distinguished as concerning specifically a flaw in the legal process which brought that particular infeftment into being. So, determination of a summons of error did not necessarily entail assessment of a fee and heritage issue. For example, on 14th October 1478 there was a hearing of the action of Alexander Hething against John Ellis, bailie of Dundee, for 'wranwiss and unordeourly proceding in the serving of a breif of Inquest of our sovuarane lordis chapel...apon certane landis and tenementis in Dundee'.⁵³ The specific allegations were that 'the balye proclomit nocht the said breif lauchfully in Dundee on 15 days and because he warnit nocht the partii to be at thir defence and because he continuit the serving of the breif fra a day to ane uther but consent of partii and als because he put the mar part and noumer of the persons that past apon the inquest of burges of Edinburgh and les noumer of the burgh of Dundee'. John did not compear, and the lords decreed that he had wrongously and unorderly proceeded in the service and they decerned the retour, sasine and all that followed upon them of no force. The brieve had been raised by Alexander Strachan, who was not present at the council hearing. If he had been present, could he have successfully pleaded a fee and heritage exception?

⁵³ADCi, pp.10-11.

Professor MacQueen has pointed out that actions of error against inquests were 'probably the commonest types of case' where a fee and heritage exception was pleaded.⁵⁴ There are at least ten such cases in this period where the action is remitted to the judge ordinary. However, there were many more summons of error between 1466 and 1506 which were not so remitted. What distinguished the summonses of error which were remitted from those which were not? Was it that procedural error could be heard by council or auditors, but that error which turned on an assessment of the substance of competing heritable claims could not? Presumably a case such as Hething against Ellis could be regarded as one in which a decision could be made without such an assessment, because the error was clearly procedural. What, then, might have been involved in assessing the substance of the verdict of an inquest? Those cases which were remitted to the judge ordinary might have been those where it was alleged that the assize had come to the wrong verdict on the evidence, perhaps as expressed in one case as 'errour and wrangwis determinacioun in the serving of the said bref eftir the hering of the resons and allegacons of bath the partiis'.⁵⁵ A specific example of this might be when error is alleged in the finding of the inquest that the deceased proprietor did not in fact die 'last vest and sesit of fee of the land'.⁵⁶ Another example would be the converse case of finding that he had 'deit last vestit and sesit as of fee of the saidis landis...howbeit the said landis wer gevin and grantit be the said Humphrey's predecessoris to umquhile John Banory and his airis male, the quhilkis failzeand to return to the successoris of the first giffare'.⁵⁷

Unfortunately, there are also cases of this sort which are not remitted and which are decided by council, for example that of John Blair in 1498 against the inquest impleaded by himself, where he successfully alleged 'wrangus delivering and

⁵⁴H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, p.224.

⁵⁵ADCi, p.6.

⁵⁶Case of Margaret Knichtson, ADCi, p.25.

⁵⁷ADCi, pp.222-3.

retouring that the sade umquhile David, grantschir to the said John, deit nocht vestit and saisit as of fee of the saidis landis of Wester Bawluny...the said umquile David being vestit and saisit as of fee in the said landis heretably be charter and saising'.⁵⁸ The lords found that David had been vest and seised of the lands 'eftir the forme and tenor of his charter...schawin and producit before the Lordis the tyme of...'. This would seem more than a procedural error, and more a case of the lords finding the retour wrong in substance after considering the evidence of a charter. However, there was no rival claim to consider in coming to this decision, which may explain why this was not characterised as a fee and heritage case. A similar kind of case which involved substantive error, but not competing claims of fee and heritage, was when an assise was alleged to have retoured that the land was held in blanche-ferme instead of ward and relief.⁵⁹ Another common ground of error was that a retour contained an incorrect assessment of the value of lands.⁶⁰

These three main examples illustrate the reduction of retours due to fault in the process leading to the retour, and reduction of an instrument of sasine because of inaccuracy in its terms. They are not apparently fee and heritage cases, but turn on some fault in process or transfer, do not involve competing claims to heritage which could be backed up by independent pieces of evidence as to title, and no final judgement is made as to who should have the heritage.

General actions raised to reduce an infeftment were uncommon, but we find an example of one in 1492 which shows council again deciding a matter which touched on heritage but was not a fee and heritage case. This is the case of James Ramsay, burgess of Cupar, against Henry Wardlaw, 'for to bring with him the

⁵⁸ *ADCii*, p.169.

⁵⁹ See e.g. *ADCii*, p.92.

⁶⁰ See e.g. *ADCii*, pp.133, 377, 393, 407, 406.

pretendit infestment maid to him be Johne Hunter of a parte of a land and tenement...to here the sammyn decernit and declarit to be of nain avale nor effect', because it was made after the land and tenement was apprised to James and because it was done in defraud of Henry's creditor.⁶¹ The lords then went on to reduce the infestment because it was 'done in fraude of the creditor'.⁶²

There are also examples of council apparently deciding whether a particular piece of land pertained to one or another person's infestment. Thus in 1498 the tutors of Robert White raised an action against Sir Laurence Mercer for wrongous uptaking of a yearly sum from a tenant in Easter Balladur for a part of the lands which were occupied by the tenant.⁶³ Lawrence admitted the uptaking but denied that the lands in question were part of the lands of Easter Balladur. The pursuers were assigned a day to prove that they were. Again, there is doubt whether the pursuer had the fee and heritage of the land in issue, but there is no mention of a competing claim as such, just an allegation that this land is not part of the land of Easter Balladur. The parties were back before council a month later for proof of Robert White's title.⁶⁴ It seems that the proof failed to resolve the matter since the lords ordered an inquest to be held by the sheriff to 'inquere gif the landis quhilk the sade Janet occupyis ar ane part of the saidis landis...and quhilk of the saidis partiis has bene in state and possessione thareof and be qhat space and tyme', the verdict to be retoured to council. In fact, no record of this retour or further council proceedings is extant.

This would seem to be a case where the original complaint did depend upon an incidental issue of fee and heritage. The reason an inquest was ordered, though,

⁶¹*ADCi*, p.238.

⁶²For similar reduction cases with an infestment made in defraud of an heir, see *ADCii*, pp.391, 455.

⁶³*ADCii*, pp.167-8.

⁶⁴*ADCii*, p.197.

was apparently not because council was not a competent forum for proof, since it had already ordered a proof by Robert White's tutors, but rather because the evidence produced before council had not been capable of supporting the contention that the disputed land was part of Robert White's infeftment, thus necessitating the taking of cognition by an inquest. What would seem to mark this out as not a fee and heritage case is the absence of a competing claim, because whoever else this land might have pertained to, they were not a party to this action. If Sir Laurence Mercer had been able to show some kind of *prima facie* heritable claim of his own, then that would perhaps have allowed him to plead the fee and heritage exception.

There are other examples of council reducing an infeftment, the cases being those where correct procedures have not been followed. On 11th July 1498 an action was heard relating to the case of Margaret White against the aldermen and bailies of Ayr and the inquest which served and retoured Marion and Elizabeth White to a tenement.⁶⁵ The cause of action was that the service had not been retoured to chancery and instead infeftment had been given directly at the hands of the bailies. Council then declared the sasine to be a nullity. This is another case where it is the intrinsic validity of a title which was in question, and which the council could therefore consider, as opposed to cases where two independent and competing claims presented themselves. Finally, another type of reduction of infeftment case could follow from a decision of council to reduce one of its own decreets when that decret had contained an order that someone be infeft in lands.⁶⁶

⁶⁵ADCii, p.65.

⁶⁶ADCii, p.331.

Submissions of ground right to council

A related development, which was to have become significant by 1529-34, was the hearing of actions by council on the ground right of parties in dispute, which could and did encompass fee and heritage. There is both direct and indirect evidence of this being an issue in proceedings before council, and its importance is that in giving their consent to the submission of such questions to the determination of the lords and the waiving of declinatory exceptions (thus implying that the action would otherwise have been outside the lords' jurisdiction) the parties obviated the jurisdictional limitations upon council which would have led to a remit to the judge ordinary in the past. Also, such submissions would seem to reflect a changing perception of council and its role in dispute resolution, as a result of which litigants came to prefer the forum of council for deciding upon their heritage. The beginnings of such a trend in the early years of the sixteenth century would fit in with the evidence already considered of declining numbers of remits to the judge ordinary and increasing numbers of declinatory exceptions, which also imply some change.

Towards the end of 1504 we find what seems to be the first extant case of a submission of a determination of ground right to the lords of council. This was in relation to a summons of error raised by Thomas Wemyss against the Sheriff of Fife and the assize which had served William Forbes his brieve of inquest. The action was part of a long-running dispute which has been charted in an article by Professor MacQueen.⁶⁷ It is not clear how the error proceedings turned out, if they were pursued at all, but we find that the procurators are said to have obliged themselves of their own free will to cause William Forbes and Thomas Wemyss to compear before the lords and 'produce charters and evidentis as they will use for the verray ground

⁶⁷Jurisdiction in heritage and the Lords of Council and Session after 1532', p.77.

right of the matter' and to admit the lords as judges in the said matter 'without exception determinat [sic], dilatour or peremptour to be raised against said judges, and shall abide at the lords' deliverance without appeal or reclamation thereafter'.⁶⁸ This is the earliest extant case of this type. The terms of the submission are very close to an arbitration agreement, but there is apparently no previous case where the submission was made generally to council as a corporate institution, instead of to named judges. Such a procedure was a departure from the normal course whereby the summons of error would have been determined, and the parties would have had to raise new brieves of inquest if the retour had been reduced. In this case we find the lords going on to decide the ground right too, an outcome which was certainly to become more common by 1529-34.

There are other examples which show that submission of ground right to council's determination was in some sense a procedure which was in issue at this time in 1504. On 22nd January 1504/5, we find William Hamilton, forspeaker for John Weir, asking instruments that he preferred to put the ground right of the matter of Folkirtone before the king and lords of council, to be decided by them.⁶⁹ Procedural debate followed on 30th January, during which John Ferny, forspeaker for John Menzies and Catherine Folkart, the pursuers, asked instruments that William Hamilton, the forspekar of Robert Hamilton and John Weir, had 'pretermittit the exception declinatour again the lordis as jugis becaus he except of before or he proponit the exception declinatour again the summondis, falsand to the said Johne his justice defens again the said exceptione declinatour'.⁷⁰ It is hard to be sure exactly what this means, due to the absence of sufficient contextual information, but then on 1st February we find an agreement that the summons raised

⁶⁸SRO CS 5/16, f.76v., 13th February 1504/5, SRO transcript p.200.

⁶⁹SRO CS 5/16, f.24v., SRO transcript p.58.

⁷⁰SRO CS 5/16, f.46v., SRO transcript p.118.

by Catherine and John against Robert Hamilton and John Weir be continued to a later date, at which time the defenders consent to compear without exception declinatour and admit the lords as judges in the said matter. We are then told that these proceedings are not to prejudice other actions, and if Catherine or John wish to raise any new summons against Robert or John, they agree to answer to it, admitting likewise the lords as judges. Further statements that the admission of the lords as judges is not to prejudice other parties from pursuing brieves of right or processes thereupon afterwards, because the admission is made with consent of party, may imply that there was a novelty in these proceedings and that they were out of the ordinary course of litigation. Presumably, that differentiated this situation from one in which the lords had taken or convened a decision to themselves, barring further proceedings at common law. The provisions are revealing because they show that apart from agreeing that the lords may hear an action, it was felt necessary to show how this related to ordinary common law procedures. The upshot seems to have been that whilst the parties in question were to receive a decret resolving their dispute, this was not to prevent other parties with some interest from resorting to proceedings before the judge ordinary.

Together, these instances show an apparently novel development in the type of dispute brought for decision before council, a development which followed from the desire of the parties to have their dispute settled in this way. Admittedly, these examples are small in number, and do not reveal as much about the nature of the actions concerned as would be desirable. However, they nonetheless illustrate something new, and provide a link with the judicial activity of council and session in 1529-34. It should be noted that this apparent extension of the jurisdiction of council resulted from the willingness of parties to consent to it.

The judicial competence of parliament in fee and heritage

The discussion in this chapter has proceeded on the basis that the jurisdictional limitations upon council in respect of fee and heritage in the later fifteenth century applied also to parliament as a court of law. Evidence in support of this view would seem to be found in the fifteen remits to the judge ordinary by the lords auditors of causes and complaints of parliament (one of which, however, may not be for the reason of fee and heritage⁷¹). As it happens, in none of these cases do the auditors expressly declare themselves not to be competent judges in such actions. The most they say is that it 'aw nocht to resort nor be determyt befor thaim becaus it is fee and heretage', and that is said in only one case.⁷² Normally, the decret just states that it is because it concerns fee and heritage that it is remitted to the judge ordinary. However, when set against identical prescriptions which emanated from council (alongside at least some incidental declarations that the lords of council were not competent judges) there would seem little reason to assume that parliament was not subject to the same jurisdictional limitations as council in this respect, and that these matters were remitted because parliament was not a competent forum in such matters.

This argument has been put in detail by Professor MacQueen, although he does not argue that parliament necessarily *could not* decide matters of fee and heritage, but rather that 'the auditors had no jurisdiction in such cases because parliament generally did not exercise jurisdiction in them either'⁷³. He also adds the qualification that 'this is not to say that parliament had no jurisdiction in fee and heritage cases. It would be more accurate to say that parliament was generally not

⁷¹Auchterlonie v. Hair, *ADA*, p.93.

⁷²Abbot and convent of Lindores v. Philip Mowbray, *ADA*, p.10.

⁷³*Common Law and Feudal Society in Medieval Scotland*, p.219.

concerned to deal with cases where there was a remedy in the general common law'. This relates to Professor MacQueen's general thesis that 'in the course of the fifteenth century the idea that parliament and council could not act where there was a common-law remedy was gradually superseded',⁷⁴ but not in 'cases relating to land and in particular in relation to disputes about ownership',⁷⁵ because of 'the continuing force of the common-law rule that, when a pursuer sought to recover lands from the possession of another, he had to proceed by way of a pleadable brieve'.⁷⁶ However, rather than marking out all questions relating to freeholds, Professor MacQueen suggests that a distinction between possessory and proprietary jurisdiction could explain why it was exclusively fee and heritage upon which council and parliament would not decide an action.⁷⁷ The result was that the only actions now remaining outwith the jurisdiction of council and parliament were fee and heritage ones, to which they were not competent judges and for which the parties must continue to have resort to the common-law remedies available.

This view has recently been questioned by Dr. Alan Borthwick in an article on the mid-fifteenth century dispute between the burghs of Montrose and Dundee, which concerned their trading privileges, in particular the right to indict forestallers at chamberlain ayres.⁷⁸ He examines the history of the dispute before the chamberlain ayre itself, the court of the four burghs, parliament, and the king and council, and following the pleadings of Montrose Dr. Borthwick characterises the case as one of fee and heritage. He argues that 'both burghs seem to have accepted that parliament had jurisdiction in their case', Montrose protesting at one point that

⁷⁴Ibid., p.235.

⁷⁵Ibid., p.236.

⁷⁶Ibid., p.237.

⁷⁷Ibid.

⁷⁸A.R. Borthwick, 'Montrose v. Dundee and the Jurisdiction of Parliament and Council over Fee and Heritage in the Mid-fifteenth Century' in *The Scots and Parliament*, ed. Clyve Jones (Edinburgh, 1996), pp.33-53.

'we refer us to the parliament quhar debatis off bondis of burowis off fee and heritage aucht off law to be determyt'.⁷⁹ Dr. Borthwick underlines the various distinctions between the king's council and parliament, in particular the council's more limited traditional concern with actions which the king wished it to hear, and parliament's status as a fenced court in which dooms could be pronounced, which may imply that as a supreme court of law parliament's jurisdiction was unlikely to be limited.⁸⁰ As a second line of argument in support of this contention, Dr. Borthwick points out that 'parliament as a whole might be faced with fee and heritage matters on appeal. It was quite possible that the doom awarding ownership of property after the execution of a pleadable breve could be falsed all the way to parliament'.⁸¹

To take the second point first, it is not clear that in the falsing of a doom concerning fee and heritage parliament would thereby engage in the determination of a fee and heritage matter. It would only be doing so if it quashed the previous doom and adjudicated upon the pronouncement of a new one itself, but that does not seem to have been within the remit of a court which falsed a doom. Professor MacQueen has argued that falsing the doom 'was significantly different from the action of error applying to retourable brieves in that the appellate court's verdict was substituted for that given below and did not merely quash it',⁸² citing an article by Sir Philip Hamilton Grierson in support of this statement⁸³. Hamilton Grierson, however, merely states that 'the judgement of that court [i.e. the court of review] was limited to a pronouncement that the judgement of the court below was either "wele gevin and evil againsaid" or "evil gevin and wele againsaid", and to the imposition of a fine on the judges whose judgement had been "evil gevin" '.⁸⁴ No reference is made

⁷⁹Ibid., p.48.

⁸⁰Ibid., p.49.

⁸¹Ibid., p.51.

⁸²'Pleadable brieves, pleading, and the development of Scots law', p.408.

⁸³P.J. Hamilton-Grierson, 'Falsing the Doom', *Scottish Historical Review* xxiv (1926), pp.1-18.

⁸⁴Ibid., pp.1-2.

to the court going on to determine its own doom on the original question upon which doom had been given and was now falsed. Thus on this argument, falsing the doom would appear to bear a close analogy to determination of a summons of error, leaving the parties to reinstitute proceedings at common law. In that case, falsing of a doom relating to fee and heritage would not place parliament in the position of deciding upon such matters directly.

With respect to Dr. Borthwick's first point, the evidence he has adduced in respect of jurisdiction relates to the pleadings of the parties, and not to any determination by council or parliament as to their actual jurisdiction. Pleadings could be made for no other reason than to win that party some advantage in the case, and the making of a submission does not necessarily imply that it was an accurate statement of the law. Several possible doubts about Dr. Borthwick's argument should be mentioned. First, it should not be too readily accepted that the right of a burgh to indict forestallers at the chamberlain ayre really was a matter of fee and heritage. The only fee and heritage cases we know about which are not directly concerned with holding the heritable fee of land are cases involving annuals and multures, or fishing rights, and even multures were no more than a way in which income could be raised from a service relating to particular mills on particular pieces of land. The traditional types of fee and heritage cases do at least bear a concrete and directly revenue-bearing relation to land, even if they do not relate to the heritable fee itself, but to other heritable interests, and they seem to be matters of property rather than a privilege such as the right to indict forestallers. Secondly, even if the matter was properly speaking one of fee and heritage, the motives of one or both parties in wishing to have the matter decided by parliament may simply have been that they considered parliament to be tactically the most favourable forum for a decision affecting their rights, and Dr. Borthwick has indicated that Montrose may

have had reason to prefer the determination of parliament to council. It seems that we do not know whether Dundee also alleged the matter to be one of fee and heritage. A third point to consider is that it is hard to see which court would have been the judge ordinary in the action other than the court of the four burghs, which the king had interdicted from proceeding in this case. Possibly, though, it could be argued that parliament itself was the judge ordinary. However, in relation to fee and heritage cases, the judge ordinary is one to whom a pleadable brieve could have been addressed, and that would have excluded both the court of the four burghs and parliament at first instance. Moreover, it is hard to see which pleadable brieve would have applied in a dispute of this kind. In other words, the circumstances of this case mean that it is not clear-cut enough and is too far removed from the mainstream fee and heritage cases to allow a reliable generalisation to be made concerning the general jurisdictional competence of parliament over fee and heritage.

In any event, although Dr. Borthwick's arguments would suggest that there was no rule restricting parliament's role in fee and heritage, his conclusion is the more limited one that 'the rule restricting their role was not strictly applied'.⁸⁵ However, the discussion above would suggest that the Montrose against Dundee case does not necessarily support this view, and that Professor MacQueen's view remains unrefuted. Besides which, it could be argued that in unusual or anomalous circumstances parliament's hearing of a fee and heritage dispute would not necessarily be seen to interfere with the normal jurisdictional rules.

⁸⁵Borthwick, *op.cit.*, p.51.

Conclusion

The main purpose of this chapter was to examine through particular decisions the workings of the fee and heritage restrictions on the jurisdiction of council and auditors, so as to produce a more detailed account of the elements which led an action to be characterised as one which should be remitted to the judge ordinary because of fee and heritage. The elements seem to be that the action depended upon a decision on an incidental matter of fee and heritage, that this matter involved more than one competing claim to a disputed title, backed up by showing lawful interest in the title, and that the decision would involve a final determination of right. Under this definition it remains possible to explain how council was able to hear other actions which have a fee and heritage element on the basis that council could examine the intrinsic validity of title (or holding) and reduce such titles when some cause of invalidity was shown such as fault in transfer or incidental legal process. Thus we can characterise the role of council in fee and heritage matters as something like a supervisory jurisdiction, essentially looking at the legality of the way things have been done in constituting a particular title, rather than at matters of substance which might arise in resolving competing claims.

There is still a question, though, whether this jurisdictional position is coherent, because it would seem likely that in many fee and heritage cases the underlying issue causing the competing claims might be some previous invalid transfer or legal process. If that were so, there would seem to be the anomalous position that council could generally determine certain legal issues but not if they arose in the context of what has been described as fee and heritage actions. On the other hand there are many other reasons why a claim to fee and heritage might have been disputed, for example because of dispute over whether a reversion had been

fulfilled, or whether heirs had taken entry in previous generations, or whether the land had been recognosced and so on. However, in themselves these particular questions would also seem to be ones which council could hear. In other words, there is an argument for thinking that the fee and heritage restriction did not relate to decisions which were restricted to the judge ordinary because of their substance, but rather because of the consequences of making such a decision in the context of the particular dispute which had come before council, namely that a party would be put out of what they claimed as their heritage. The restriction therefore almost seems to be a procedural rather than substantive legal rule, relating to the law of civil remedies rather than jurisdiction *per se*.

Having at least defined more closely the nature of the jurisdictional restriction, the decisions of council and session between 1529 and 1534 can be examined with a more reliable means of determining whether the jurisdictional position was the same as in the late fifteenth century or whether it had been eroded or otherwise changed. Also, if other procedural mechanisms for bringing such matters before council arise with any frequency, it will be apparent whether their deployment is also a novelty compared to the late fifteenth century. We have seen that the earliest submission of ground right to council happened in 1504, and it is also notable that there seem to be no cases at all of council advocating a matter from another court to itself between 1478 and 1506, something which was certainly to be in evidence by the later 1520s at least. Whatever changes can be identified by the later 1520s, we can see how they relate to developments which were in evidence by 1500, with the decline in remits and increase in protests and exceptions about jurisdiction. Ultimately, the council was to assume jurisdiction in fee and heritage, and the next question is to ascertain whether this position was any closer by 1529-

34, and whether the foundation of the college of justice in 1532 had any bearing upon it.

Chapter Two

The Jurisdiction of Council and Session over Fee and Heritage 1529-1545

Introduction

In the previous chapter the workings of the fee and heritage restriction on council's jurisdiction were examined in relation to the later fifteenth century evidence. It was argued that the scope of the restriction was much narrower than previous work on the subject has assumed, and an attempt was made to define exactly those circumstances in which the lords of council would decline jurisdiction because of fee and heritage, and remit an action to the judge ordinary. The main criterion would be that the action before council depended upon deciding an incidental question of fee and heritage when such a question involved more than one competing heritable claim. In other words, a final determination of right would be required in order to conclude the action before council. Despite this restriction, however, council could examine the intrinsic validity of a title and reduce it where false cause or fault in transfer or legal process could be shown, or some error intrinsic to its constitution.

This argument amounts to a qualification of the view that council was barred from hearing actions relating to fee and heritage. This is because outwith the circumstances outlined above there were other competent actions before council which nonetheless related to heritage. Moreover, there is a qualification even to the supposed theoretical basis underlying the restriction, since there is no difference in legal principle between assessing the intrinsic validity of one title and assessing that

of two competing titles laying claim to the same land. The practical difference is that the consequence of adjudicating over two titles is that one may be upheld over the other. Doing this would amount to vindicating a party's claim to be the heritable proprietor against a like claim. In essence, it was this type of decision which was outwith the competence of the council in the fifteenth century.

The basis of the jurisdictional rules was therefore not as clear-cut as might have been supposed. That they were not more clear-cut, though, is hardly surprising, since they developed as a way of relating two different systems of remedies to each other. One had developed by the thirteenth century and was rooted in the structure of sheriffs' and justiciars' courts with procedure by brieve and inquest. The other developed primarily in the fifteenth century as litigants petitioned the king's council for redress. Conciliar actions of ejection, spuilzie, wrongful occupation, error and reduction seem to have formed an alternative and comprehensive set of remedies which superseded the pleadable brieves of mortancestor, dissasine and, eventually, right. However, there was a long transitional period before there was recognition that all such matters could be resolved before council. This was because the jurisdiction of council seemed to be inhibited by the terms of the 1318 statute of Robert I, which required the use of a pleadable brieve before a man should answer for his free tenement. However, the terms of that legislation were not applied as a direct bar on council's jurisdiction. Instead they gave rise to a restriction which was expressed in terms of fee and heritage. The underlying rationale seems to have been that protecting possession was a proper function of council but that deciding who had the heritable right in a fee was not.¹

¹H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), chap.8.

The purpose of this and the next chapter is to offer an explanation of what led to the recognition that council's jurisdiction was no longer restricted in matters of fee and heritage, and to suggest a date by which this had occurred. Such questions are intimately bound up with the development of the institution of the session, and in explaining the apparent expansion in its jurisdiction it should be possible to assess whether the foundation of the college of justice in 1532 had any effect on this process. To investigate these questions, all proceedings before council between 1529 and 1534 have been examined. A study of the decisions of council during these years should allow an answer to be given to the question whether council had jurisdiction over fee and heritage in 1532. It should also be possible to further our understanding of whether council was expanding its jurisdiction at this time, and, if not by 1532, whether it was regarded as possessing jurisdiction over heritage by the 1540s. This chapter will take the wider period 1529 to 1545 and discuss existing interpretations, principally Professor MacQueen's interpretation, of the evidence with illustrations from the unpublished record from 1529-34. The following chapter will consist of a systematic examination of the evidence from 1529-34 so that a new interpretation may be offered.

The development of jurisdiction over heritage

By 1559 we know that the lords of session were being described as 'the last and supreme judges in this kingdom in civil matters', with 'full cognizance in all civil causes...' and that the sheriff had 'jurisdiction and cognizance in all civil causes in the first instance, except matters concerning lands and heritages, as for claims for the same in which the said sheriff has no jurisdiction....'.² Evidently the fifteenth century jurisdictional rules, and the procedure of remitting to the judge ordinary in heritage

²'Discours Particulier d'Ecosse 1559/60', ed. P.G.B. McNeill in *Miscellany II*, ed. W.D.H. Sellar (Stair Society, Edinburgh, 1984), pp. 113, 109.

cases, were no longer relevant or in operation, and had in fact been reversed so that only the lords of session could pronounce on questions of heritage.

Prior to 1559, however, our knowledge of the jurisdictional position has to be derived mainly from individual decisions, recorded in the register of council. In order to examine the development of jurisdiction in heritage between 1506 and 1559 historians have not probed beyond the sparse selection of decisions which have been published, in part because of the immense scale of the manuscript record. The published sources include occasional decisions recorded in the *Acts of the Lords of Council in Public Affairs 1501-1554*, a selection edited by R.K. Hannay,³ decisions from 1532 and 1533 printed in *Selected Cases from Acta Dominorum Concilii et Sessionis*,⁴ and particular decisions of which later writers such as Sir James Balfour and Sir John Skene were to publish their own accounts. Reliance on such published sources is apt to be misleading, because the principles of selection are usually neither clear nor systematic, whilst in addition no guarantee exists that other significant cases do not remain unpublished, and it is difficult, if not impossible, to place such decisions in the context of other similar decisions and, generally, the business of the court at the time.

Using the evidence which has been available and searching for a *terminus ante quem* for the establishment of jurisdiction in heritage, Professor MacQueen has noted that 'later sixteenth-century writers cited cases of the 1540s as authorities for the proposition that the lords of session enjoyed what had become an exclusive jurisdiction in heritage'.⁵ The cases in question are *Wemyss v. Forbes* (1543) and

³*Acts of the Lords of Council in Public Affairs, 1501-1554*, ed. R.K. Hannay (Edinburgh, 1932), hereafter *ADCP*.

⁴*Acta Dominorum Concilii et Sessionis 1532-1533* ed. I.H. Shearer (Stair Society, Edinburgh, 1956), hereafter *Acta*.

⁵H.L. MacQueen, *Common Law and Feudal Society*, p.239.

Caldwell v. Mason (1545), cited by Skene and Balfour respectively.⁶ Professor MacQueen has examined these decisions against the background of several cases from the 1530s and argued that 'both *Wemyss* and *Caldwell* seem...to be links in a chain of decisions by which the court established its 'practick' and, in a piecemeal, step-by-step way, the meaning of its jurisdiction in heritage', given that 'the general jurisdiction in heritage ... seems to have been accepted by the end of the 1530s'.⁷ The two cases therefore represent the application of a general principle to particular questions brought before the court, in order to reflect the new jurisdictional competence which the court seems to have regarded itself as possessing. It is implicit in this argument that council and session did not yet have jurisdiction over heritage in 1532, since at that time 'it was still arguable that the Lords had no jurisdiction in such cases'.⁸ These arguments and their supporting evidence therefore fall into two parts - that relating to a perceived process of jurisdictional expansion in the 1530s, and that relating to the significance of *Wemyss* and *Caldwell*, and both will now be examined.

The process of expansion of jurisdiction over heritage 1532-1545

(i) Changing perceptions of the appropriate court to decide heritage

A serious problem of interpretation which confronts the historian investigating these questions is that he is particularly concerned with concepts such as jurisdiction over fee and heritage which do not feature at all prominently in the language of the record. When they do appear in the record, close examination of the context can

⁶Discussed in H.L. MacQueen, 'Jurisdiction in Heritage and the Lords of Council and Session after 1532', in *Miscellany II*, pp. 61-85, with transcriptions of the council record of the cases, and the texts of Skene's and Balfour's accounts of them.

⁷*Common Law and Feudal Society*, p.241.

⁸*Ibid.* ; See also 'Jurisdiction in Heritage', p.62; H.L. MacQueen, 'The Brieve of Right in Scots Law', *Journal of Legal History* iii (1982), p.66.

sometimes lessen or alter their apparent significance. For example, what of apparent submissions in the early 1530s that, far from being outwith council's jurisdiction, causes of heritage ought best to be decided by the council? Professor MacQueen has drawn attention to the fact that by 1532 'it was being argued that the Lords were the most appropriate judges to try causes of heritage', citing three examples of this. However, does this necessarily reflect anything about their jurisdiction over fee and heritage? In two of the cases, for example, the cause of action is not directly a matter of heritage, and contains no fee and heritage issue as defined in the previous chapter, but is concerned with the feudal casualty of non-entry.

For example, in the case of *Christine Lindsay v. The Archbishop of St. Andrews and John Beton* in 1533, Henry Lauder submitted for the pursuer that 'the lordis of counsal usis to tak decision of sik nonentres that passis apone the ryt of menis auld heritage befor thame self and sufferis nother sheriff nor balze to sit thiron'.⁹ This is not a case involving a decision directly on fee and heritage, but, rather, whether or not entry had been taken of lands in the past, and the plea is that decisions of the latter sort ought to be taken before the lords. Whilst a dispute such as this over non-entries might well have consequences for a man's heritage - might touch 'the ryt of menis auld heritage' - since if land had been held to be in non-entry that meant that the vassal had been without sasine since the death of the last proprietor and might now risk being deprived of it permanently, in itself such a decision would not be on the fee and heritage in the sense outlined in the previous chapter. Nevertheless, although not necessarily illuminating the question of jurisdiction over fee and heritage, independently of this the case is evidence of a perception that if heritage was at stake this could be a reason why a case should come before council. Indeed, in this case we find that ten months later the parties

⁹*Acta*, no.33; Scottish Record Office CS 6/2, f.179v.

'submittit thaim to the lordis of counsal anent the propirte of the saidis landis' so as to resolve the claim of ward and non-entries against that of heritage.¹⁰

In 1533 the action of *Robert Leis v. Robert Carnis* also concerned a contested claim over non-entries, involving a decision on 'auld heritage and nonentres thirof', but again it was not actually a fee and heritage case.¹¹ Non-entries always could have been decided before council, and the issue in this case and that of *Lindsay* seems to have been how to persuade council to remove them from particular judges ordinary, with no sense of it thereby acquiring jurisdiction over heritage.

In the third case, *Davidson and others v. The Burgh of Ayr*, the impetus also seems to have been to get the matter brought before council, and again a claim is made that sheriffs 'ar small personis of litle knowlage and undirstanding to decid apoun thair auld heritage...and the lordis usis to tak sic grete materis before thaim selfis'.¹² The commission to the sheriffs was suspended until a fortnight later when it was produced before the lords and declared 'ordourlie procedit'. It then transpired that the commission had been ordered by the lords of council, to whom the burgh of Ayr had previously complained. The lords had ordered that cognition be taken of lands and fishings which both parties claimed in heritage, but had decided that since the sheriff of Ayr was a suspect judge to the parties, the cognition would be taken by sheriffs under special commission. On 29th March 1533 the lords decreed that the commission should be put to execution, but on 28th April we find a 'compromitt' registered before council, whereby the parties agree that the 'propirtie and possession' of the fishings should be 'finalie decydit befor the saidis lordis'.¹³

¹⁰SRO CS 6/4, f.86.

¹¹*Acta* no.70; SRO CS 6/2, f.182.

¹²*Acta* no.30; SRO CS 6/2, f.112.

¹³SRO CS 6/2, f.153r.

The two actions for non-entries were ordered to be proceeded before the lords, whereas in *Davidson*, which does seem a genuine fee and heritage case, the lords order that the action be proceeded before the sheriff and it is by submission of the parties that it is later transferred to be heard before them. The three cases do then seem to be evidence of a preference being expressed for adjudication by the lords of council. However, the preference does not seem to be expressed in terms of being a departure from the old fee and heritage restriction. Rather, part of the reason for the preference is that the cases were important because they related to matters affecting heritage, and that such important cases should come before the lords.

(ii) Cases relating to jurisdiction in the 1530s

The argument put forward by Professor MacQueen for a process of gradual expansion of jurisdiction in the 1530s is based on a number of grounds. There is an appearance of uncertainty in 1532 and 1533 over whether council had jurisdiction in fee and heritage. On the one hand, 'it was being argued that the lords were the most appropriate judges to try causes of heritage', but on the other, 'it was still arguable that the lords had no jurisdiction in such cases, presumably because, since a successful action would destroy a title to land, they touched heritage'.¹⁴ Against this uncertainty there follow decisions, some of which appear to assert, some to deny jurisdiction in comparable fields relating to the reduction of infeftments. By the end of the decade, though, in Professor MacQueen's view, the general principle has been established that the lords may decide fee and heritage. In cases such as that of *Wemyss* the decisions of earlier years which are now inconsistent with this jurisdictional view are effectively reversed, helping to establish a uniform jurisdictional position.¹⁵

¹⁴*Common Law and Feudal Society*, pp.240, 241.

¹⁵*Ibid.*, p.241; 'Jurisdiction in Heritage', p.82.

The evidence used to support this interpretation consists of the cases of *Wigtown v. Whithorn* from 1532¹⁶ and *Duddingston v. Duddingston* from 1533,¹⁷ which together are taken to show that there was still 'room for debate as to whether the lords could take cases which might involve depriving a man of his heritage'.¹⁸ The latter case is also taken to show that 'the lords declared themselves competent to reduce infeftments, while recognising that this meant acquiring jurisdiction in proceedings against heritage'.¹⁹ There follows the case of *Cunningham v. Glengarnock* in 1535²⁰ which is characterised as 'a decision...that the lords could not reduce "old" infeftments'.²¹ Then in 1539 there is an ordinance that summonses for reduction of infeftments are to have a privileged status in the tabling of actions to be called before the lords. This is interpreted as supporting evidence that 'jurisdiction has been established', and the case of *Rowallan v. Cunninghamhead* from 1539/40 to show that 'certainly by the end of that decade they were prepared to determine such questions even where reduction of an infeftment was not involved'.²² Overall, 'there was then clear recognition in the 1530s that, by taking jurisdiction to reduce infeftments the lords were establishing for themselves a jurisdiction in heritage'.²³ In the 1540s *Wemyss* extends this process, since Professor MacQueen argues that it 'appears to be part of a reversal' of the decision in *Cunningham v. Glengarnock*.²⁴

¹⁶ *Acta* no.15; SRO CS 6/2 f.19.

¹⁷ *Acta* no.89; SRO CS 6/2 f.219

¹⁸ 'Jurisdiction in Heritage', p.82.

¹⁹ *Common Law and Feudal Society*, p.241.

²⁰ *ADCP*, p.440.

²¹ *Common Law and Feudal Society*, p.241.

²² 'Jurisdiction in Heritage', p.82; *ADCP* pp.484, 486.

²³ 'Jurisdiction in Heritage', p.82.

²⁴ *Common Law and Feudal Society*, p.241.

Wigtown and Duddingston (1532-1533)

To what extent do the cases of *Wigtown* and *Duddingston* illustrate that there was room for debate over the heritage jurisdiction of council? Both cases concerned the reduction of an infeftment, but in itself this was a well-established action before council. The 'debate' in question was simply that the defender pleaded an exception to the jurisdiction of council, alleging that the lords were not competent judges in the matter. This would at least imply that in 1532 there was no widely accepted or categorical reason why such an exception would necessarily fail. However, the fact that the pleas were made does not necessarily imply that the procurators who made them had any firm expectation that they would be accepted. What seems to be significant about the two cases in the present context is that these pleas were rejected by the lords, and there is no evidence that they saw any ambiguity in their jurisdiction on these questions. However, that in turn does not necessarily imply that they regarded themselves as possessing jurisdiction over heritage. They merely regarded themselves as judges competent in these particular cases, which is not surprising since reducing infeftments was part of their traditional jurisdiction. Between 1466 and 1506 we know of only eleven cases involving reduction of an infeftment which were remitted to the judge ordinary. Ten of these were error cases, leaving only one example out of the fifty-eight remit cases which concerned a summons simply for the reduction of an infeftment.

That example relates to Marion Sinclair's summons against her son, David Hume of Wedderburn, in 1500, for reduction of the resignation of the fee of the half of the lands of Polwarth which pertained to Marion in heritage, and the sasine and infeftment to David which followed. There is no recorded submission of why the case should have been remitted, but we find that the lords 'referris this accione til the

juge ordenare competent, because the decisione of the sammyn owthir secludis the ta parti or the tother of the heretage thair of for ever....'.²⁵ This is a very puzzling decision, at least on the information given. It would appear to fall outwith the definition of a fee and heritage case given in the previous chapter, and so it is hard to explain systematically why it should have been remitted. The main reason why it does not seem to be a fee and heritage case is that there are not two competing titles. Marion herself would have had no heritable claim, precisely as a result of the resignation and infestment, which at the outset of her action were still valid. She wished to reduce David's infestment in order to restore her own title to Polwarth. One possible way of interpreting this as a fee and heritage case would be that in alleging David's infestment to be invalid, Marion could lead her prior infestment against it, effectively placing two titles in competition.

The action was part of a wider dispute between Marion and her son David. Marion's first marriage had been to George Hume of Wedderburn. It was presumably his death in 1497 and her remarriage to George Kerr of Samuelston which prompted the litigation in question.²⁶ Marion's sister Margaret had been entered to her half of the lands of Polwarth in 1475, and presumably Marion received hers at about that time.²⁷ The infestment of David Hume in Polwarth took place following a resignation into the hands of Alexander, Duke of Albany, in 1479.²⁸ Marion had married George in 1470, so David would have been a minor at this time.²⁹

²⁵*Acts of the Lords of Council in Civil Causes 1496-1501*, ed. G. Neilson and H.M. Paton (Edinburgh, 1918), p.434. Hereafter ADCii.

²⁶*Historical Manuscripts Commission Report on the Manuscripts of Colonel David Milne Home of Wedderburn Castle* (London, 1902), p.28. David Hume was served heir to George Hume in January 1497/98.

²⁷*The Scots Peerage*, ed. J.B. Paul (Edinburgh, 1904-14), vol. VII, p.2.

²⁸*Hist. MSS. Comm. Milne Home Report*, p.25. Record of the giving of sasine to David Hume of half lands of Polwarth in 1479.

²⁹*Scots Peerage*, vol. VI, p.1.

By February 1499/1500, we find Marion raising an action of error against David's service as heir to the lands of Kimmerghame, which action was called again at the end of 1500.³⁰ At the same time, David had an action against her for the withholding of charters, instruments of resignation and sasine of fee and franktenement of the lands of Polwarth. Marion alleged that she and her husband had reserved to themselves the franktenement, and was ordered to prove this.³¹ Marion was also pursuing David for wrongous occupation of her terce land of Wedderburn, of which he claimed the fee with no reservation of terce.³² By 4th December 1500, the parties had 'compromitted' to have their dispute decided by a selection of lords of council.³³ None of this, however, makes it easier to explain why the reduction action was remitted, other than on the basis already suggested. On this occasion it seems to have been enough to show that in deciding the question of reduction, the lords would in effect determine to whom the lands would pertain in the future - David Hume or the heirs of Marion and George Kerr. However, legally they would not have been upholding one claim over another, because the alleged grounds for reduction would have rendered the resignation and infeftment a nullity if accepted. That kind of decision is one which the lords seem to have had jurisdiction to make, and the conclusion must be that *Marion Sinclair v. David Hume* rested on other facts which are not recorded in the register, or that it may be simply inconsistent with all other known decisions of the lords in this area of law.

As already noted, in the case of *Duddingston* Professor MacQueen has also argued that 'the lords declared themselves competent to reduce infeftments, while recognising that this meant acquiring jurisdiction in proceedings against heritage.'³⁴

³⁰ *ADCii*, pp. 394,456.

³¹ *ADCii*, p.394.

³² *Ibid.*, p.396.

³³ *Ibid.*, p.460.

³⁴ *Common Law and Feudal Society*, p.241.

This accurately reflects the record in the sense that the lords repelled an exception pleaded against their competence to hear this action, but beyond that there is no reason to think that this case had any special significance in jurisdictional terms. The lords were simply upholding their established jurisdiction to reduce infeftments. The record states that John Lethame, forspekar of Steven Duddingston, alleged in relation to a summons 'for retraction of his infeftment of his landis of Sandfurd, that the lordis war na competent jugis thirto, bot suld be decedit befor the jugis competent. The lordis be sentence interlocutor decernit that thai ar competent jugis thirto....'.³⁵ There is no sense of jurisdiction being 'acquired' here, and no hint of a general declaration of jurisdictional competence. After all, in *Wigtown* eight months earlier the lords had also decided that 'thai ar competent juges to the summondis raisit at the instance of the community of Wigtoune v. communite of Quithorne for reducing of thir infeftment notwithstanding the exception proponit that the lordes ar na competent jugis in the said mater'.³⁶

Prior to *Wigtown*, there had been another five cases since 1529 where a protest or exception that the lords were not competent judges over heritage had been repelled in cases involving reduction of infeftments (these will be considered in the next chapter). The only explicit mention of heritage in the *Duddingston* case comes in the next entry in the register recording the pleading of a second exception that Steven Duddingston was 'of less age and in the kingis ward and therefore the lordis mycht not proceid agains him in his heretage quhill he war of lauchfull age'.³⁷ This exception does not relate to jurisdiction as such, and this mention of 'heretage' cannot simply be equated with the fee and heritage concept restricting the lords' jurisdiction over heritage. This follows from the conclusion drawn in the previous

³⁵SRO CS 6/2, f.219.

³⁶SRO CS 6/2, f.19.

³⁷SRO CS 6/2, f.219.

chapter that it had traditionally been only a certain kind of decision relating to heritage which was beyond council's jurisdiction, not simply any decision affecting heritage in some way. In particular, reduction of infeftments was competent before the lords and this was the remedy sought in both *Wigtown* and *Duddingston*.

Do these two cases have any special significance then, in relation to the jurisdiction of the lords over heritage? In neither are we told the reasons given in support of the exception, merely that there was a submission that the lords were not competent judges in the said matter, followed by their declaration that they were. No mention is made of fee and heritage. Presumably, the strategy underlying the pleading of the exceptions was to persuade the lords that the two actions for reducing infeftments could be classified as fee and heritage cases of the sort traditionally excluded from council's jurisdiction. By declaring themselves judges competent, the lords were not declaring themselves competent to decide fee and heritage as such, but merely that these cases were not fee and heritage cases in that sense. The reason for interpreting their decisions in this way is that, as already remarked, reduction of infeftments had always been competent before the lords. Moreover, a reason for this is that the structure of a reduction action meant that there would not be a clash between two titles, since only one was in issue, in itself. What does seem to be suggested by the exceptions in *Wigtown* and *Duddingston*, however, is that in theory at least, in 1532 and 1533 a case might still be classifiable as one which the lords were not competent judges to hear, by implication when it related to fee and heritage. If so, this would seem to be evidence that the jurisdictional restriction on council had not in any formal sense been superseded. But, by the same token, the occasional pleading of such an exception falls far short of being evidence that the jurisdictional restriction was ever *applied* by the 1530s. In short, though, neither case offers evidence of jurisdictional change or expansion.

Cunningham v. Glengarnock (1535)

The jurisdictional position in the early 1530s would seem to have been in line with the traditional position, then, and the evidence does not immediately suggest jurisdictional expansion. What of the 1535 case which Professor MacQueen interpreted as involving a decision that the lords could not reduce old infeftments? A difficulty with that interpretation is that the only evidence in the published sources is an isolated protest which happened to be included in *Acts of the Lords of Council in Public Affairs*.³⁸ It is only a protest and contains no record of any decision by the lords of council themselves. The procurator who made the protest, John Lethame, 'wald admitt the lordis na competent jugis to him in the action movit be the lard of Glengarnok aganis him becaus it is ane auld infeftment', but it is not stated whether the lords accepted this. A curiosity of the protest is that Lethame produced 'ane decret and determination of the hie parliament of Scotland, quhar it wes fund and decernit that the lordis war na competent jugis to auld infeftments', and it is this decree which is founded upon as the basis of his plea. However, since the text of the decree is not given, we are left unaware of its date or terms, and so cannot judge whether Lethame's categorical statement is an accurate reflection of the decree in question.

There are several related points to note here. Even if Lethame's version of what the decree says is true (and no parliamentary record has yet come to light to allow comparison), it could easily be the case that the decree itself was 'auld' - if it were a few decades old or even a few years, would it be capable of shedding light on the attitude of the lords in 1535 to their jurisdiction? Moreover, if it is assumed that council would not necessarily be bound by such a decree - and that assumption must

³⁸ADCP p.440.

be made if *Wemyss* is to be characterised as a decision that the lords could reduce old infeftments - then why should it be assumed that the production of such a parliamentary decree in 1535 should leave the lords with no choice but to decline jurisdiction? An alternative explanation might be that the terms of the decree did not require the lords to decline jurisdiction. Either way, in itself the protest cannot support a claim that the lords declined jurisdiction in reducing an old infeftment in 1535.

Moreover, a search through the manuscript record reveals further proceedings in the action which show that the lords went on to declare themselves judges competent in this action, despite the protest. On 8th July 1535, John Lethame stated that he was adhering to the protestation already made against the judges' competence. However, 'the lordis be sentence interlocutor decernis and declaris thame jugis competent to the actioun and caus...notwithstanding the allegiance proponit be M. Jhone Lethame prolocutor for the said William Cunnyngnam that the lordis war na competent jugis to the said actioun allegeand the same wes ane auld infeftment maid 23 yeres syne with the mair Becaus it wes understand to the saidis lordis that the said infeftment wes maid *inter contrahentes & partes ad huc superstites* & the action is now movit betwix the samun partys' (italics added).³⁹ Therefore this decision is that the lords are indeed competent judges, regardless of allegations that they 'war na competent jugis to auld infeftments' or the production of decrees of parliament to support such claims. Characteristically, the lords do not address either of these points in their decree, but the explanation given is that they were competent judges in the action because the infeftment was made between contracting parties who were still alive (or between contracting parties and other parties who were still alive, depending how one translates the Latin). Since the

³⁹SRO CS 6/6, f.167.

question of old infeftments is not alluded to in the decision, the most that can be said is that if an old infeftment was involved in this case, then in itself this was no reason why the lords were not competent judges.

As a separate point, it is possible to ask what the legal distinction might have been between an old infeftment and one which was not old, assuming that there was such a distinction. A clue is perhaps given in the use of the term in *Wemyss*: the procurator 'allegit the said mater was auld and that the lordis war na competent jugis thareto, because thare was divers sesingis, retouris and infeftmentis past thareupoun and as yit standing unreducit'.⁴⁰ It is possible to read this as presenting the alleged reason why the lords could not be competent judges to old infeftments. On that basis an old infeftment would be one the rights in which had been transferred under subsequent infeftments which themselves remained valid and unreduced. However, it is hard to see how such a distinction could justify disallowing the reduction of old infeftments, since it would be the validity of the old infeftment which would have to be attacked first in order to question the validity of the later ones. Not only does such a distinction seem unlikely to have led to jurisdictional constraints, but the debate whether it might have done in 1535 seems of little significance when it is realised that earlier decisions show clearly the lords reducing infeftments which were 'old' not only under this definition, but even in a completely non-technical sense. For example, on 4th August 1529 the lords reduced at the instance of the king a resignation of lands by the earl of Huntly and subsequent infeftment of Alexander Seton, made during the reign of James II, over seventy years earlier.⁴¹ The motivation of the king was to establish his right to the casualty of non-entry for all of those years since the death of the earl. In this earlier case the allegation was also made that the lords were not competent judges, which was rejected by the lords.

⁴⁰'Jurisdiction in Heritage', p.64.

⁴¹SRO CS 5/40, f.84v.

Given this example, it is hard to believe that six years later the lords *could* have been persuaded to agree that their jurisdiction did not extend to the reduction of old infeftments. These issues will be examined later specifically in relation to the decision in *Wemyss*.

Tabling Ordinance (1539)

Referring to actions which might see a man put out of his heritage and the capacity of the lords to hear such actions, Professor MacQueen states that 'in 1539 the jurisdiction has been established and the action is to be a privileged one'.⁴² What support for this can be found in the terms of the tabling ordinance? It states that all summonses for reduction of infeftments be 'privilegiat, tablit and callit' on Mondays weekly, 'becaus the samin concernis tinsale of heretage'.⁴³ In direct terms, this is evidence about the relative importance which the reduction of infeftments had come to have as an action before council, reminiscent of the privileged status which had often been conferred upon actions of recent *spuilzie* in the fifteenth century. However, it is far from clear that the ordinance implies anything about jurisdiction over fee and heritage. After all, reducing infeftments was an established conciliar remedy, as already argued, and the ordinance would reflect therefore an administrative and not a jurisdictional innovation. Additionally, the characterisation of the action as one which 'concernis tinsale of heretage' should not necessarily be taken to depend upon the jurisdictional notion of fee and heritage, since it is used in other contexts which clearly do not relate to that notion. For example, in March 1530 there was an action by the king against James Grant for payment of seventeen years' worth of 'few mailis' of lands, owed by his late father and himself, and to 'heir him to have tynt and forfaltit hes heretage of the saidis landes becaus he and hes

⁴²'Jurisdiction in Heritage', p.82.

⁴³*ADCP* p.478.

fadir has failzeit to pay....'.⁴⁴ There would therefore seem to be reason to regard the phrase as a general one which can be equated with 'losing of a particular title' as opposed to 'losing of a particular title through vindication of another one over and against it.' Such actions would 'touch' heritage, but would not be heritage actions under the fee and heritage rule.

On the other hand, the fact that the importance of such summonses in tabling is explicitly said to be 'because the samin concernis tinsale of heretage' may be evidence that contemporaries in the late 1530s had come to regard reduction of infestment actions as striking at the heart of issues of heritage, even if at the same time no one believed that the reduction of an infestment *per se* was beyond the jurisdictional competence of council. It may be that they had come to perceive that, increasingly, litigants were settling disputes over title through such actions, and that in deciding upon them the lords were actually settling disputes over fee and heritage. So the jurisdiction to reduce infestments may not have expanded at all in itself in the 1530s, but the perception may have been that some kind of jurisdiction in heritage was being entrenched through this traditional ground of action. The nature of the reduction of infestments before council between 1529 and 1534 will be examined in the next chapter.

⁴⁴SRO CS 5/41, f.50.

Rowallan v. Cunninghamhead (1539)

Apart from the 1539 ordinance, Professor MacQueen cites a case of the same year as an example of a decision by the lords on fee and heritage, with the suggestion that the case constitutes further evidence of the expansion of the lords' jurisdiction over heritage. This is because the case demonstrates that 'they were prepared to determine such questions even where reduction of an infeftment was not involved'.⁴⁵

The evidence for this statement lies in two published excerpts in *The Acts of the Lords of Council in Public Affairs* of an action between the lairds of Rowallan and Cunninghamhead. Unfortunately, it would be necessary to search the manuscript record to find further evidence of proceedings in the action. The record as published does not make it clear what the original ground of action was, but the stage proceedings have reached is that the lords are to decide a question of 'ground right' between Rowallan and Cunninghamhead. Two individual lords of session have received a commission to go and take evidence in the locality, and retour their findings to the lords for their decision.⁴⁶ Amongst other things, the published summary informs us that they are to 'tak cognition upon the ground of the samyn of the quantite of the said muir and how mony soumes gers may be sustenit and pasturit tharon', in other words to determine the size of the muir and its pasturage capacity for livestock.⁴⁷ Findings of fact are made by an inquest, and the lords then decern that the muir pertains to Rowallan, fix the annual pasturage capacity, and award a fixed portion of that capacity to Cunninghamhead in proportion to the holdings of land he possesses adjacent to the muir.

⁴⁵'Jurisdiction in Heritage', p.83.

⁴⁶*ADCP* p.484.

⁴⁷*Ibid.*

The assumption must be that in decerning the muir to 'pertain' to Rowallan, the lords are deciding that it pertains in fee and heritage. However, nothing in the printed record explicitly mentions fee and heritage. All we are told is that the lords are deciding upon ground right, and there could be many disputed rights in land other than the heritable fee. Also, it is perhaps not entirely clear whether this is really a decision of the lords themselves on heritage, or whether the inquest and retour constituted the legal process for determining the right, from which determination the lords could make their decision on pasturage.

Three further difficulties present themselves in interpreting this decision as exemplifying the exercise of jurisdiction over fee and heritage by the lords of council, and as such representing an innovation since the early 1530s. The main one is that the lords give their decree 'in amicable wys', which means that they were determining this dispute as arbiters or amicable compositors. Although not otherwise evident from the printed record, the parties must have submitted their dispute on the ground right to the lords as arbiters, and so their decision does not reflect upon their residual ordinary jurisdiction.

A second difficulty is that the use of this procedure to decide questions of ground right does not seem to have been a novelty - there is a very similar case from 1533, for example, arising from a supplication by John Colquhoun of Netherfallow against Andrew Murray of Blackbarony. The complaint was that John had a summons of recent spuilzie pending against Andrew resulting from Andrew's alleged ejection of John's cattle from the common of Craighouse within the barony of Blackbarony. John now wished the lords to open the depositions of certain witnesses and give decree.⁴⁸ However, Andrew had previously complained that John

⁴⁸SRO CS 6/3, f.157.

and others had troubled him in the enjoyment of his lands of Craighouse which pertained to him in property and heritage. He had obtained letters by deliverance of the lords of council to commission the sheriff of Peebles to call the parties together and take cognition.⁴⁹ At that time John had complained that Andrew's action prejudiced his action of spuilzie, and had charged the sheriff to cease his proceedings and refer the whole matter to the lords. As a result, in November 1533 the lords had, with consent of party, advocated the matter to be proceeded before themselves instead of the sheriff of Peebles, to be heard at the same time as the summons of spuilzie. So in response to John's request for the lords to open the depositions and give decree, Andrew pointed out that 'the mater wes with consent of party advocat befor the lordis of counsal', and both summons were to be heard together.⁵⁰ Cognition had not been taken and so the lords were now requested to 'cheis certaine lordis of session to be jugis thirin as the lordis thocht maist necessar and expedient.' The lords then chose judges from amongst themselves to sit as sheriffs depute of Edinburgh, 'gevand thame power to pass apon the ground of the saidis landis of Craighous and tak cognition of the best and worthiest of the schire...geif the said Andrew has bene in possession of the saidis landis of the craighous as his propirtie'. Cognition is to be taken and the facts retoured to the lords 'that justice may be ministrat'.⁵¹ This should have happened by March, but by May 1534 there is as yet no record of further proceedings.

Both John and Andrew's actions turned on whether the land of Craighouse was Andrew's heritable property, and that must have been the issue to be decided by the taking of cognition. The procedure seems comparable to that in the case of Rowallan, with a decision by the lords waiting upon a retour from an inquest to be

⁴⁹SRO CS 6/3, f.80r.

⁵⁰SRO CS 6/3, f.157.

⁵¹Ibid.

summoned under commission by selected lords. If the similarity is accepted, the 1539 case cannot be construed as demonstrating an expansion or development in the lords' jurisdiction since the early 1530s. What should be noted, however, is that this form of proceeding in the 1530s is certainly a novelty when compared with the period 1466-1506.

Conclusions on the 1530s

This survey of the evidence from the 1530s suggests that the lords of council were not expanding their jurisdiction over the reduction of infeftments, but were exercising their established and traditional jurisdiction in such matters. However, the tabling ordinance of 1539 implies that this category of action was becoming more significant and, along with occasional fee and heritage exceptions pleaded in reduction of infeftment actions, it suggests that the lords were being perceived to settle questions of heritage through their jurisdiction to reduce infeftments. If that perception was widespread enough, then there was no logical reason why contemporaries should not have come to accept that the lords should be considered to possess a general jurisdiction to determine fee and heritage actions. In Chapter One it was argued that the logic of this deduction was present in the structure of the restriction on council's jurisdiction from the beginning.

The aim of the next chapter will be to test this hypothesis against a systematic consideration of the evidence from 1529-34, and to relate it to other developments which may have been occurring. However, first the significance of *Wemyss* and *Caldwell* must be reassessed in the light of this survey of the 1530s.

(iii) *Wemyss v. Forbes* and *Caldwell v. Mason*

Professor MacQueen drew attention to these two cases in his article on 'Jurisdiction in Heritage and the Lords of Council and Session after 1532', taking as his starting point their citation by later sixteenth century writers as authorities for the jurisdiction of the lords over heritage.

In his *De Verborum Significatione*,⁵² Sir John Skene cited *Wemyss v. Forbes* for the proposition that the lords 'find themselfe, conform to the institution of the college of justice, and jurisdiction granted to them, to be judges competent in all causes of heretage'.⁵³ In his *Practicks*,⁵⁴ Sir James Balfour cited *Caldwell v. Mason* for the proposition that 'the lordis of sessioun alanerlie and na uther judge, ar jugeis competent to actiounis of heritage'.⁵⁵ Comparison with the original council record, and the contemporary report of *Wemyss* in the *Practicks* of John Sinclair, a lord of session, show that the suggestion that these cases asserted jurisdiction in all causes of heritage is a gloss by Skene and Balfour with no warrant in the record. Both cases are concerned with the reduction of infeftments, and the jurisdictional question turned on whether they were competent judges to reduce the infeftment in the case before them, not on whether the lords could hear the action as one concerning heritage. Professor MacQueen recognised that 'there is no explicit statement about jurisdiction in heritage' in either case.⁵⁶ However, earlier writers had tended to take Skene's account of *Wemyss* at face value: J. Irvine Smith judged it to have been a case 'where the session set the seal on what was by then apparently accepted practice

⁵²J. Skene, *De Verborum Significatione* (Edinburgh, 1597).

⁵³'Jurisdiction in Heritage', p.63.

⁵⁴*The Practicks of Sir James Balfour of Pittendreich*, ed. P.G.B. McNeill (2 vols., Stair Society, Edinburgh, 1962-63), p.269.

⁵⁵'Jurisdiction in Heritage', p.62.

⁵⁶'Jurisdiction in Heritage', p.82.

by holding itself to be the competent court in all actions relating to heritage - actions formerly sacred to the courts of the feudal superior'.⁵⁷

However, Professor MacQueen argues nevertheless that both cases are 'steps in a process whereby the lords expanded the jurisdiction and made it exclusive to themselves'.⁵⁸ Does the evidence bear this out in the light of the conclusion that there was no particular expansion in this field in the 1530s? In the previous chapter the attempt was made to show that the *context* in which the lords were asked to consider a title which was under challenge in litigation was crucial in determining whether the case was outwith their jurisdiction. What was the context in *Wemyss*? Professor MacQueen states that 'it is clear however that the nub of the action was competing claims of right to land such as might have been determined in earlier times by a *briefe of right*'.⁵⁹ However, to prove that particular infeftments in land were invalid would not normally require an assessment of competing claims which may have been in existence, and it was that, more limited, remit which council and session fulfilled in reducing infeftments. No doubt the confused situation underlying *Wemyss* could have been resolved ultimately with a *briefe of right*, but that did not preclude moving alternatively in a more gradual way towards a resolution through the reduction of disputed infeftments. Therefore, there is even an argument for questioning whether this action was indeed one which the fifteenth-century council 'would have declined to hear...on the ground that it concerned fee and heritage'.⁶⁰

It is hard to know what grounds of reduction were argued in *Wemyss* in 1543. The background to the case, which is charted by Professor MacQueen in his article,

⁵⁷*An Introduction to Scottish Legal History*, ed. G.C.H. Paton (Stair Society, Edinburgh, 1958), p.27.

⁵⁸'Jurisdiction in Heritage', p.82.

⁵⁹*Ibid.*, p.79.

⁶⁰*Ibid.*

may hint that a ground of action might have been that the reduction in 1477 of the grants, entail and infeftments of John Wemyss was invalid. If so, this would mean that the lands in the two charters in question in 1543 should have passed under the entail, and their regrant in these charters was therefore a nullity. That would seem to be exactly the kind of narrow ground which council always had been able to consider in reducing infeftments, a decision on which would not involve considering how to resolve other competing claims of right which had derived from these charters. An analogy with 'the litigations between the first Arthur Forbes and John Wemyss in 1479, which council referred to the judge ordinary' because of fee and heritage, is not persuasive in arguing that the 1543 case would also have been referred to the judge ordinary at that time. This is because the 1479 case was not for reduction of an infeftment but rather for spuilzie. It was demonstrated in Chapter One how easily a spuilzie action could be characterised as a fee and heritage case, and that a reduction of infeftment case could not normally be characterised in that way. Furthermore, the calling of his warrantor by the defender does not imply that the case was a fee and heritage one, but is only to be expected in an action for reducing an infeftment which presumably had a warrandice clause. So in jurisdictional terms there seems to be no reason to classify the 1543 case as a fee and heritage one. It was simply a traditional reduction of infeftment case.

It seems that the terms of the submission as to jurisdictional competency themselves bear this out. It was not alleged that it was because the case concerned fee and heritage that 'the lordis war na competent jugis thareto'.⁶¹ It was 'because thare wes divers sesingis, retouris and infeftmentis past thareupon and as yit standing unredusit.' This seems to imply that the objection was not inherently to the reduction of the infeftment, but to reducing it whilst 'divers sesingis, retouris and

⁶¹Ibid., p.64.

infestmentis past thareupon' stood unreduced. It has already been noted that this argument in itself seems ill-founded, and it is no surprise that in *Wemyss* it was rejected. A similar objection to the jurisdictional competence of the lords was raised in 1536 by the procurator of John Crichton in connection with an action by the king for reduction of John's infestment in certain particular lands. The argument which was advanced was that the action 'was apoun fe and heretage past be successioun to sindry airis', but the lords rejected this, holding themselves judges competent in the matter. They also state that the 'kingis grace has na jugis within his realme bot the lordis of his counsale', which presumably meant that any action raised by the king was competent before the lords of council and session.⁶²

How does this interpretation fit in with Sinclair's note of the case in his *Practicks*? The form of his report is to summarise the submission of Forbes' procurator that the lords were not competent judges in the case, followed by the lords' declaration that they are so. In giving reasons, the lords answer the allegation made simply by stating that they are competent judges because 'thai wer thir divers yeiris in use of calling sic materis befor thame...', in other words because it was their practice to do so.⁶³ It would be interesting to know whether the phrase 'divers yeiris in use of calling' could imply whether this use was recent or long-standing. The arguments in this and the previous chapter, however, would suggest that the jurisdiction to reduce infestments could not have been in doubt in 1543. However, in a way the procurator's argument went wider than this, according to Sinclair, since he tried to argue that in reducing an infestment in this situation, 'thairthrow vald cum in disputioun of the rycht of his landis' and such disputation should be resolved by brieve of right and not by the lords of session. The record does not make it clear

⁶²SRO CS 6/8, f.67v. I am grateful to John Finlay for this reference.

⁶³Ibid., p.63.

whether it was accepted that in reducing the infeftment the right in the lands would come into dispute, but simply that reducing the infeftment was competent.

However, Sinclair's report does afford the valuable insight that a secondary reason for rejecting Forbes' submission was that 'the brief of rycht is nor hes nocht yit bene many yeiris usit in this realme.' Of course, just because the brieve of right might have fallen into disuse by 1543 does not mean that the lords of session could therefore decide such questions themselves. The desuetude of the brieve of right might simply have meant that when such matters were brought before the sheriff a different procedure was employed which in some way involved the taking of cognition by an inquest. However, since in the procurator's submission a decision by brieve of right is contrasted only with a decision before the lords of session, and part of the lords' answer is to say that the former is in disuse, this might imply that beyond the jurisdiction to reduce infeftments the lords also considered that they could hear disputation on the right of lands, such as had been previously determined under a brieve of right.

A case from 1533 might even suggest that the deciding of right over land before the sheriff by procedures other than pleadable brieves was actually incompetent. This is the case of *Robert Dalzell v. James Livingstone*.⁶⁴ Dalzell complained that a mill in the sherifffdom of Lanark pertained to him in heritage, along with the thirl multures, but that James Livingstone had purchased letters to the sheriff of Lanark to take cognition upon the ground right of the thirl multures when the sheriff and his deutes were not 'competent jugis thirto be cognition bot be ane brieff of ryt or utheris wais requirit of the law.' The lords decern the letters 'unordourlie procedit' because their terms required the taking of cognition upon the

⁶⁴SRO CS 6/3, f.142r.

ground right of the thirl multures. That would in turn suggest that if, by 1543, the brieve of right was in disuse then such disputes over heritable rights in land could be heard only by the lords of session. On the other hand, in the *Davidson* case in 1532-33 a commission was made to sheriffs to take cognition on lands and fishings claimed by the two parties in heritage. And in *Colquoun v. Murray* in 1533, as we have seen, the lords commissioned some of their number to sit as sheriffs depute of Edinburgh and take cognition whether Murray had been in possession of the lands as his heritage.⁶⁵ And in a case reported in Sinclair's *Practicks* from 1544, in recording a ruling of the lords that an action begun before themselves could not then be repledged to another court, Sinclair uses the telling phrase 'albeit thair be divers schireffis, *ordinar judges in heretage*, and als lordis of regaliteis ordinar judges, nochttheles thai mycht nocht of the practik of Scotland repledge ony actionis fra the lordis....' (italics added).⁶⁶

Therefore, although *Wemyss* does not appear to mark any new development of the lords' jurisdiction to reduce infeftments as such, it does imply that their role in resolving disputes over right in land was now coming to be seen differently. This is because Sinclair's report strongly suggests that the point was not far off when the jurisdiction exercised in reducing an infeftment could be equated with that exercised in deciding upon disputes concerned generally with the right in lands. In fact, it would be possible to argue that the equation appears to be made in *Wemyss*. However, the lords' interlocutor runs 'that thai ar jugis competent in the said mater as it cumis befor thaim,' and the phrase 'as it cumis befor thaim' might imply that they could have considered that it was the presentation of the case to them as one for reduction of infeftment which brought it within their jurisdiction, and that it was

⁶⁵SRO CS 6/3, f.157.

⁶⁶A.L. Murray, 'Sinclair's Practicks' in *Lawmaking and Lawmakers in British History*, ed. A. Harding (Royal Historical Society, London, 1980), p.99.

conceivable that they might not have been judges competent to a case with such underlying issues of heritage. If the equation was *coming* to be made, though, this fits in with the argument that in the 1530s the lords were exercising a traditional jurisdiction over heritage, but that there was a changing perception that in reducing infetments they were seen to resolve disputes over heritage, and thus in effect to be deciding upon heritage. *Wemyss* might then be evidence that the realisation *was* now following that if the lords' jurisdiction allowed them to decide such matters, then could it not be induced from this that fee and heritage disputes in general could be properly decided by them? Indeed, depending upon what implications are considered to arise from the apparent desuetude of the brieve of right by 1543, it might be judged that this realisation had occurred.

Of course, other parallel developments would almost certainly have contributed to this development. One would have been the growing perception of institutional authority possessed by the college of justice - there is evidence that its status was being perceived by the early 1540s in a markedly different way from the session before 1532, at least in the minds of pleaders arguing about jurisdiction. A few days after the *Wemyss* hearing in 1543 we find the case of *Bothwell v. Flemings*, in which the submission was made that 'the lords of council were also judges ordinary in all civil actions within the realm, by the first institution of the college of justice'.⁶⁷ Similarly, outside the common procedures of the session, there is much evidence of the submission of a variety of disputes, including ones over ground right, to the lords of session for decree or of their corporate appointment as arbiters. In addition, a preference for the lords as judges is evident in the large numbers of advocations to the session of actions raised in other courts to which parties agree. These parallel developments will be investigated systematically in later chapters.

⁶⁷Lord Bothwell v. Flemings (1543), Mor. 7322.

Turning now to *Caldwell*, does the discussion so far call for a reassessment of its significance? To what extent is Balfour's view that the case decided that 'the lordis of sessioun allanerlie, and na uther judge, ar jugeis competent to actiounis of reduction of infestmentis...' justified by the record of the lords' decision? The submission had been made that the provost and bailies of the burgh court of Glasgow were not competent judges in the action of reduction of infestments because the lords of council were used to taking the determination of all such actions to themselves and to remit them to no other judge.⁶⁸ The lords are asked to advocate the matter and do so 'becaus thai ar in use to tak the decisioun of all actiounis of retretting of infestmentis, evidentis or seisingis to thame selfis', and therefore discharge the provost and bailies from further proceeding in the matter. This does seem unequivocal, in that it is a statement that the lords will customarily take before themselves all such decisions, implying that by 1545 this important class of action had become one pertaining exclusively to the jurisdiction of the lords. One doubt here, though, is that the lords do not actually state that the provost and bailies of Glasgow were not competent judges in the matter, but just that they are in use to take such matters before themselves. The question is whether this meant that the lords regarded the session as the only proper or competent forum for reducing of infestments or whether it was simply that if a party desired such an action to be heard before them they would automatically advocate it. It should be noted that in the charge to John Mason it is stated that the provost and bailies should be discharged for these reasons unless he can 'schawin ane ressonable cause quhy the sammyn suld nocht be done'.⁶⁹ This could be merely standard form, but it might imply that there could be circumstances in which the action could have remained before the bailies. However, the fact that the submission is made that the lords take such matters to themselves 'and remit the same to na uther jugis' implies that the

⁶⁸Jurisdiction in Heritage', p.81.

⁶⁹Ibid.

question *was* one of exclusive jurisdiction, and - if the submission reflects accurately the view of the lords - the lords did regard it as an action pertaining exclusively to their jurisdiction. There is an analogy with the form of words used to mark out the lords' jurisdiction over questions of non-entries as exclusively theirs in cases ten years earlier, such as *Lindsay v. The Archbishop of St. Andrews and Beton* and *Carnis v. Leis*.⁷⁰

This interpretation of *Caldwell* (as asserting exclusive jurisdiction) would seem to be confirmed beyond doubt by a report in Sinclair's *Practicks* of another case from 1543 in which the lords are said to have decided that 'by the law and practick of Scotland thair is na juge spirituall nor temporall to reduce heretable infestment or cognitioun in materis of heretage bot the lordis of counsall alanerlie'.⁷¹ In turn, it may be revealing that the jurisdiction claimed here is not over reduction, or reduction of infestments as such, but specifically over reduction of heritable infestments or cognition in matters of heritage, in effect isolating those reduction cases which related to fee and heritage. The language used here by Sinclair to describe the terms of the decision may simply reflect the submissions of the parties, so that the import of the case is merely that, amongst other cases, in one involving the reduction of a heritable infestment or cognition taken in a matter of heritage, the lords possess an exclusive jurisdiction. In other words, it may simply have been that the case before them featured such a scenario and that was what was reflected in the terms of the decision. Nevertheless, if it were to be taken literally as demarcating reduction actions relating to heritage this would fit in with the pattern already noticed, whereby instances in the 1530s showed how particular importance was ascribed to actions which were seen to relate to heritage. Having said that, this case would still appear to have significance only in relation to the exclusive nature of the

⁷⁰SRO CS 6/2, f.179v.; CS 6/2, f.182.

⁷¹Sinclair's *Practicks*, p.98.

lords' jurisdiction, not the jurisdiction itself, since that was the traditional one over reduction of infeftments and retours.

Caldwell seems to demonstrate that the lords now exercised an exclusive jurisdiction over the reduction of infeftments, and this would seem to make it a much more significant case than *Wemyss*, since it would thereby represent a development in the jurisdiction of the session. Of course, the same position might have obtained in *Wemyss*, but have failed to receive articulation in the record since in that case the issue was simply whether the lords themselves could hear the action. However, the other 1543 case from Sinclair's *Practicks* makes clear that it already obtained at that time.

However, another case from Sinclair's *Practicks* provides significant evidence of the attitude held by the lords at this time to their jurisdiction *outwith* such traditional categories of action, in this case specifically in relation to fee and heritage. In a report from June 1540 we find Sinclair stating that 'according to the custom of Scotland he [the sheriff] can only cognosce concerning possession and the cognition of lordship and property belongs to the lords of council', and that the sheriff therefore cannot 'cognosce' the validity of a title.⁷² These observations are made by Sinclair in the context of a decision by the lords to reduce the decree of a 'sheriff *in hac parte*' which had found Cameron of Lochiel (alias Ewan Alanson) to have wrongously occupied lands pertaining to John Maclean of Coll in heritage. Lochiel now claimed that he had possessed heritable sasine of the lands in question, and apparently produced evidence which had not been led before the sheriff.

⁷²Edinburgh University Library, Laing MS III 388a, c.16; Sinclair's text is 'is enim secundum consuetudinam Scotie de possessione tantum cognoscit et ad dominos consilii pertinet cognitio dominii et proprietatis.' ['For according to the custom of Scotland he can only cognosce concerning possession and the cognition of lordship and property belongs to the lords of council']. I am grateful to Dr. A.L. Murray for providing me with this reference along with his transcription and translation of the text and a note and summary of the council record of the case in SRO CS 6/12, f.188.

Sinclair notes that 'many things were alleged' against this infeftment by Maclean, but nevertheless the lords reduced the decree in question, because Lochiel had 'real possession and occupation' and, as the council record itself reveals, he had been infeft in the lands by the king.

It is only in Sinclair's report of the decision that the question of jurisdiction is mentioned. He relates that the lords advised Lochiel that he should seek reduction of the charter and sasine of Maclean, and that in the meantime it remained a valid title. It is at this point that Sinclair notes that 'if an objection had been raised before the sheriff to the defender's title [i.e. Lochiel's title], had he produced it, the sheriff could not cognosce the validity of the title', followed by his statement that by the custom of Scotland the sheriff can only determine questions of possession whilst determination of lordship or property 'belongs' to the lords of council. There seems no reason to doubt Sinclair's statement as representing the attitude of the lords of session to their jurisdiction by 1540, since although his comments go beyond the official record in the council register, they supplement what is related there without contradicting it, and in fact it seems likely that Sinclair is giving us a record of some of the actual deliberations and exchanges in court of the sort which are not usually revealed in the register. Moreover, they carry particular authority since he himself was a lord of session. What is unusual about this case compared to others we have considered is that it does not relate to the reduction of an infeftment, but to an action of wrongous occupation. The evidence put before the lords to support reduction of the sheriff's decree showed that both parties had heritable infeftments to support their claims to the lands, although only one of them had been produced before the sheriff. Thus Lochiel's occupation was not wrongful, and he was entitled to keep possession, and so the sheriff's decree should be reduced. That was the issue before the lords. However, the facts of the case fit the classic pattern of a fee and heritage

action of the sort that, had it been proceeded before the lords, would have been remitted to the judge ordinary in previous decades. There were two competing heritable titles and an allegation of wrongful occupation. Sinclair observes, though, that it would not have been competent for the sheriff to decide upon the validity of the competing heritable claims. The sheriff in this case, Andrew Blackstock, was a sheriff *in hac parte* by commission, but Sinclair does not explain the limited competence of the sheriff by reference to his remit being limited in this case by the terms of his commission, but rather by the categorical statement that 'the cognition of lordship and property belongs to the lords of council'. In other words, Sinclair seems to be saying that a sheriff may protect possession if supported by a title, but he may not adjudicate upon competing heritable titles and thereby determine the fee and heritage. Such questions should be determined by the lords of council.

This is a complete reversal of the jurisdictional position outlined in Chapter One, which concerned the period 1466-1506. Far from cases being remitted to the judge ordinary, this position would require fee and heritage cases to be remitted to the lords of council, and no doubt the procedure of advocacy to the session came to replace that of a remit to the judge ordinary in such cases. A clue as to the manner in which the lords exercised this jurisdiction over 'lordship and property' is suggested by Sinclair's title for this chapter of his *Practicks*: 'possession with title prevails until the title is reduced when the action concerns unjust occupation, even though the other party has an older title'. In other words, when there are two competing heritable titles, far from that entailing a remit to the judge ordinary, the correct remedy to seek is reduction of the competing title. Sheriffs are not entitled to determine such questions (so Sinclair states) and as we have seen the remedy of reduction of infeftments was regarded as pertaining exclusively to the lords of council by 1543. Thus the lords seem to hold that disputes over heritable titles must

be resolved by way of reduction, and that this remedy may be obtained only from the lords of council. That would seem to be tantamount to stating that matters of fee and heritage can be determined only by the lords of council and session, and no longer by the judge ordinary.

Conclusion

The main theme of this chapter has been that in the 1530s and the early 1540s the lords of session were exercising their traditional jurisdiction and that they were not in formal terms developing a jurisdiction over heritage, or expanding their jurisdiction in categories of action relating to heritage such as the reduction of infeftments.

However, that is not to say that there was no change occurring in the nature of their jurisdiction. Professor MacQueen observed that 'Murray's study of Sinclair's practicks suggests that the Lords were expanding their jurisdiction in a number of other fields as well in this period'.⁷³ It should be noted, though, that the changes which Dr. Murray comments upon do not really relate to new areas of jurisdiction as such, but to making the pre-existing jurisdiction of the lords an exclusive one in certain instances. He cites examples of the lords claiming exclusive jurisdiction over certain actions, and of refusing to remit cases to other courts by way of repledging, once begun in the session.⁷⁴ Moreover, this kind of change does not just date from the 1540s, the period covered by Sinclair's *Practicks*, but is in evidence by 1532.

⁷³*Common Law and Feudal Society*, p.242.

⁷⁴Sinclair's *Practicks*', pp. 98-99.

In that year the lords heard an action raised by William and David Ramsay against the prior and convent of St. Andrews, relating to an action for the reduction of a nineteen-year tack which had been raised before the official of St. Andrews.⁷⁵ They declared that 'all sic materis of 19 year tak suld be persewit befor thaim as the consuetude has beine in tymes bipast'. It had been alleged that such an action before the official was 'ane noveltie', but the import of the lords' ruling would also appear to be that no other *civil* court was entitled to hear such actions.

This apparent development of exclusive jurisdiction in certain areas is clearly an important one, and seems to run parallel to the shift in perceptions of jurisdiction over heritage. However, it does not affect the contention that during the 1530s and 1540s the formal jurisdiction being exercised in relation to heritage, and actions such as the reduction of infeftments, was the traditional one of council and session.

However, the action to reduce infeftments seems to have been much commoner in the 1530s than it had been several decades earlier, and if disputes over heritable title were increasingly being approached using this ground of action, this may account for a final breakdown of the distinction between fee and heritage actions proper (those traditionally excluded from the lords' jurisdiction) and actions touching heritage such as the reduction of infeftments (those within the lords' traditional jurisdiction). If it was perceived that disputes over heritage in effect were being adjudicated upon by the lords under the particular ground of reducing infeftments, then it may have seemed to contemporaries that there was no reason why the lords should not decide upon fee and heritage in any other context. At the same time, we have seen that it could be a reason motivating parties to request the lords to hear an action that it *did* relate to heritage, and that various alternative

⁷⁵SRO CS 6/2, f.5v.

procedures were in use for bringing disputes before the lords, and that some kinds of action were becoming exclusive to the jurisdiction of the lords.

There must have come a point at which there was assumed to have been a formal incorporation of fee and heritage actions into the jurisdiction of the lords, or alternatively the whole notion of the fee and heritage restriction may have come to seem defunct and dependent upon the use of procedures such as the *briefe of right* which had been superseded. If the former, then one possibility is that it happened indirectly, masked by procedural innovation. This is a possible implication of the action from 1544 which was referred to earlier and which Dr. Murray cited, relating to an admiralty case. It is perhaps significant that this was also the case in which it was alleged that the lords were judges ordinary in all civil actions by virtue of the institution of the college of justice. The lords also said, however, that other judges '*mycht nocht of the practik of Scotland repledge ony actionis fra the lordis*', and that therefore the present action, having been begun before the lords, could not be remitted to the admiral court. Included in this general prohibition were '*schireffis, ordinar judges in heretage*'.⁷⁶ That might appear to mean that once an action had been begun before the lords, it would not be remitted to another court, and therefore by implication the lords would decide actions raised before them in all circumstances. That might have meant that a case *could never* be remitted to the judge ordinary again, as fee and heritage cases had been in the late fifteenth century. Of course, the decision is actually considerably narrower than that, since it is a prohibition on judges themselves from personally seeking to have actions remitted to their courts. It says nothing of the rights of parties to request that a case be remitted. Nevertheless, it might point to a way in which the lords could finally have entrenched a jurisdiction over heritage. Furthermore, Sinclair's report of *Cameron of*

⁷⁶Sinclair's *Practicks*, pp. 98-99.

Lochiel v. Maclean would seem to indicate that it was by 1540 that the lords of session had ceased to recognise the competence of the sheriff to decide fee and heritage, and regarded their own jurisdiction over the reduction of infeftments as the sole competent means of deciding such matters. If so, the formal integration of jurisdiction over fee and heritage into the general jurisdiction of council and session may have occurred by this point. In the following chapter these matters will be assessed against the council record between 1529 and 1534.

Chapter Three

Jurisdiction over Fee and Heritage and the Reduction of Infestments before Council and Session, 1529-1534

Introduction

In Chapter One a definition of a fee and heritage action was offered to explain the nature of the jurisdictional restriction operating upon council in relation to such actions. In the last chapter, evidence from between 1529 and 1545 was considered in the light of this definition and a critique was put forward of aspects of Professor MacQueen's interpretation of this evidence. The main reservation was that the evidence in question related largely to actions for the reduction of infestments, in which the lords had an established jurisdiction evident already in the late fifteenth-century records. The exercise of such a jurisdiction could therefore not necessarily be equated with the exercise of jurisdiction over fee and heritage. Thus the evidence from the 1530s and early 1540s had little jurisdictional significance, except that it showed the assertion of exclusive jurisdiction over certain actions, including the reduction of infestments. None of this evidence, however, seemed to provide a commentary directly upon the jurisdictional restriction over fee and heritage. In that respect, there were merely traces of a development whereby actions were expressly considered to be of particular importance when they bore some relation to heritage (not necessarily in deciding upon fee and heritage), and that deciding upon such actions was coming to be associated particularly with the session. However, the report by Sinclair of the case of Cameron of Lochiel against Maclean which was

discussed in Chapter Two does suggest that by 1540 the lords of session had indeed come to regard fee and heritage as pertaining to their jurisdiction alone.

In this chapter there will be discussion of evidence from 1529 to 1534 of exceptions pleaded to the jurisdiction of the lords because of fee and heritage,¹ and the absence of remits to the judge ordinary, in order to assess whether the attitude of the lords to their jurisdiction had changed by comparison with the 1466-1506 period. In addition, all the actions raised for the reduction of an infeftment will be considered in order to assess the role of such actions in resolving disputes, again by comparison with the earlier period. In particular, the aim will be to test the hypothesis that by the 1530s a party who sought redress in a dispute concerning heritage was more likely to attack his opponent's alleged title directly through having his or her infeftment reduced by council than he would have been in the later fifteenth century. Through arguing for the reduction of an infeftment the party would thereby obviate the old jurisdictional restriction on fee and heritage.

It is worth noting at this point that it is improbable that all disputes relating to heritage could be resolved through actions to reduce infeftments, and this is one reason why by the 1530s complex disputes over land were being brought before the lords by extraordinary procedures or submitted to them as arbiters. Such matters, along with the procedure of advocacy, will be examined in the subsequent chapters.

¹See Appendix, p.309.

Remits to the judge ordinary and declinatory exceptions

Perhaps the single most striking feature of the record of council decisions from 1529 to 1534 is that not a single action was remitted to the judge ordinary because of fee and heritage. Between 1478 and 1506, as we have seen, there were only occasional years in which no cases of this sort were remitted. The longest continuous period without a remit was from November 1495 to April 1498, amounting almost to two and a half years or twenty-nine months.² In terms of calendar years which saw no remits and the ensuing period of time between such remits as there were, there were no remits in 1489 and an ensuing gap of over a year and a half; none in 1492 and a gap of eighteen months; none in 1494 and a gap of two years; none in 1499 and a gap of twenty-seven months; none in 1501 and a gap of almost two years; none in 1505 and a gap of twenty months. There are other years, of course, which cannot be taken into account very well due to the partial or complete loss of records: 1483, 1485, 1486 and 1487, for example.

Thus, insofar as we can judge from the state of the records they demonstrate that between 1478 and 1506 it was not out of the ordinary for council hearings to proceed for a year or two without any cases being remitted to the judge ordinary, the longest period in question being twenty-nine months. However, the period of five years between 1529 and 1534 (records covering sixty-two continuous months were examined) in which not one case was remitted in this fashion was completely without precedent in the period up to 1506. In order to explain this, one possible inference is that by 1529 the lords had ceased to remit cases of this sort to the judge ordinary, and other evidence of their general attitude to the nature of their

²*Acts of the Lords of Council in Civil Causes*, ed. T. Thomson (Edinburgh, 1839), p.429 [hereafter *ADCi*]; *Acts of the Lords of Council in Civil Causes 1496-1501*, eds. G. Neilson and H.M. Paton (Edinburgh, 1918), p.175 [hereafter *ADCii*].

jurisdiction at this time might support this. If, as argued in the last chapter, by the early 1540s the point was not far off when the formal recognition would have occurred that the lords could decide heritage (and indeed had been recognised by the lords themselves by 1540), then it seems inherently unlikely that they could have been persuaded to remit such a case for lack of jurisdiction by the 1530s at all. The remitting procedure then could well have fallen into desuetude by 1529 for fee and heritage cases. Litigants occasionally still attempted to argue that the lords were not competent judges, but it is striking that at least between 1529 and 1534 such arguments were never successful.

This amounts to a notable reversal of the situation which existed up until the early 1490s, when all such exceptions which we know of were successful (although there is no way of estimating whether there were unsuccessful exceptions pleaded before that time which it may simply not have been the practice to record in the register). The first recorded unsuccessful one before council came in 1492.³ Whilst the period 1466 to 1506 as a whole contains 110 cases of protests or exceptions of this sort, of which 52% were remitted to the judge ordinary, if one narrows down to take the period 1492-1506 one finds 29% of the 66 such cases remitted, and from 1500-1506, 18% of the 57 cases. So by comparison, a significant change had occurred by 1529-34, when none of the eleven such cases was remitted.

As these figures make clear, the pleading of such exceptions in the first place was far less common by 1529-34, especially when compared with 1500-06. Including those which resulted in a remit to the judge ordinary, from 1500 to 1506 there were respectively 5, 8, 7, 6, 10, 7 and 15 exceptions pleaded to fee and

³ADC i, p.263.

heritage actions. By comparison, from 1529 to 1534 there were respectively 4, 3, 1, 1 and 2 exceptions of this sort.

There is also a qualitative difference to be discerned between the types of case which featured commonly amongst those which were remitted between 1466 and 1506 and those which parties attempted to have remitted between 1529 and 1534. The actions from the earlier period most often related to wrongous occupation (there are about fifteen such cases), or spuilzie (about fourteen examples). The other actions which constituted a sizeable proportion of the remit cases were for error (about ten) and payment of annualrent (about nine). However, there were also other types of action which were sometimes remitted. These concerned drawing off running water from its course in relation to a mill and fishings; wrongfully withholding charters; payment of thirl multures; casting of peat in a moss; and, on one occasion, the reduction of the resignation of the heritable fee of lands. By contrast, in the ten out of eleven exceptions pleaded between 1529 and 1534 in which the cause of action is clear, all related to an action for the reduction of an infetment, and not one to the traditional categories of action which featured in the later fifteenth century, as already outlined. The eleventh is not explicitly revealed as a reduction of infetment case, but concerns a 'biggin' in a borough which is in point of 'tynsell', which sounds like an action for apprising, but conceivably could have involved the reduction of an infetment as well.⁴

Thus from 1529 to 1534 we have a period of over five years in which the lords never declined jurisdiction because of fee and heritage, although the old jurisdictional restriction upon them had never been formally abandoned. Only eleven attempts were made to have jurisdiction declined on this basis, virtually all in

⁴*Adam Hopper v. Janet Turing & William Adamson*, CS 5/40, f.74v.

actions for the reduction of infeftments, and each attempt failed. Yet the session was as busy as ever, and had a stronger institutional identity than ever before, to the extent that it was declaring or assuming itself to be the only competent forum to hear certain kinds of action. We have seen an illustration of this from 1532 in relation to reducing nineteen-year tacks. The lords stated that such actions must be pursued before themselves and that this had been the 'consuetude' in 'tymes bipast'.⁵

It should be noted that the development or assertion of exclusive jurisdiction was mainly in relation to actions concerning land. The 1530s show similar claims made over non-entries, and the 1540s show ones over the reduction of infeftments, for example. In making these claims the lords were not staking out new areas of jurisdiction but were removing the right of other courts to hear certain actions, primarily when interests in land were at stake. This is unusual and interesting, since it shows the lords of session taking an initiative in defining their jurisdiction in a way which cannot simply be regarded as responding to the needs of litigants. In fact, it is a sign of self-consciousness on the part of the court that it started placing constraints upon the jurisdiction of other courts in relation to general classes of action. It seems extremely unlikely that in the face of this development the old restriction on fee and heritage would continue to be recognised by the lords - developing an exclusive jurisdiction over subsidiary and dependent interests in land hardly seems compatible with a prohibition from determining the ultimate interests on which they depend, i.e. the heritable fee. Of course, we know that the prohibition was not maintained, and the real question is how the transition occurred whereby the restriction was obviated and finally abandoned. The fact that virtually all of the fee and heritage exceptions pleaded between 1529 and 1534 arose in the context of reduction of infeftment actions would seem to support the suggestion made above

⁵SRO CS 6/2, f.5v.

that such actions had become an important means of settling disputes over heritage. But is there anything else suggestive about the nature of the cases in which exceptions were pleaded?

In most of the eleven cases the allegation is simply that the lords are not competent judges in the action, although in one it is specifically that 'thai suld be na jugis in ground rycht'.⁶ That the idea (if not the practice) of remitting to the judge ordinary was still current is brought out in one case, in which the lords 'decernis that thai ar competent jugis to the said mater as it comes befor thaim notwithstanding that it is allegit that the samyn concernis the heritage and suld be decydit befor the juge ordinar'.⁷

In more than half the cases some kind of reason is offered why the lords are not competent judges. In August 1529, for example, John Crichton of Strathurd's forspekar alleged that the lords were not competent judges to a summons 'raisit at the instance of the kingis grace for the nonentres of the landis of Tulibody', to which the lords responded that they were competent judges, 'nochtwithstanding the allegiance maid...that the said mater concerns the fee and heretage of the saidis landis'.⁸ The action here is characterised as one concerning non-entries, and establishing a right to this casualty was undoubtedly the ultimate goal of the action, but the means by which this was to be achieved was through the reduction of an infeftment, and that must have been why John Crichton took exception to the action. We can see that it was not a fee and heritage action, though, since there were no competing titles. The action merely 'touched' heritage. However, John Crichton stood to lose his title, which depended upon that of Ninian Seton of Tullibody (whose infeftment would be

⁶SRO CS 5/42, f.119r. 15th March 1530/31

⁷SRO CS 5/41, f.4. 12th March 1529/30.

⁸SRO CS 5/40, f.81v.

invalidated by the reduction of the resignation and infeftment of his ancestor, Alexander Seton). Since the *de facto* result of the king's action would be the loss of Crichton's title, it is readily apparent why he tried to argue that it was a fee and heritage action. However, as an action for the reduction of an infeftment it was unambiguously within the jurisdiction of the lords.

In most other cases the reason given for the exception is simply that the action 'concernit fee and heritage'.⁹ However, in two cases the allegation is made specifically that it is because it is a reduction of infeftment action that the lords may not hear it. In February 1530/31, for example, the plea was made against a summons by Finlay Spittal's procurator that the lords were not competent judges 'because the same was for reducing of ane infeftment'.¹⁰ In November 1532 the procurator of one of the tutors of Melchior Cullen, defending an action raised by Margaret Inglis, alleged that the lords were not competent judges 'becaus the said action concernit the retreting of ane infeftment and sua the rycht of hes heretage....'.¹¹ Thus in at least one case the argument was explicitly mounted that a reduction of infeftment case was a fee and heritage action because it concerned the 'rycht' of the defender's heritage. Of course, the point of a reduction of infeftment case was not that the pursuer had a greater 'rycht' to the lands to which the infeftment related, but that the defender's 'rycht' was a nullity and in itself not one upon which he could lay claim to the lands.

It is telling, perhaps, that the terms used by the lords in this last case in asserting their right to hear it were taken from the particular grounds put forward by the pursuer to justify the reduction, rather than any general statement that by their 'practick' such cases were customarily heard before them. In the *Spittal* case the

⁹SRO CS 5/42, f.40.

¹⁰SRO CS 5/42, f.46v.

¹¹SRO CS 5/43, f.92v.

lords declared that 'thai war competent juges in the said mater becaus the said infetment was gevin be circumventioun'.¹² In the *Inglis v. Cullen* case the lords decerned that 'thai mycht proceid apone the sumondis...becaus the mater wes intendit agains the said Melchiores fadir and dependand be summondes the tym of hes decess....'.¹³ It is hard to know how to interpret such abbreviated explanations, especially since the record was made up by a clerk and not a lord of session. In the *Spittal* case, for example, circumvention is clearly going to be the main ground for reduction, but does the way in which the record expresses the decision on jurisdiction imply that only reduction of infetment actions pleaded on particular grounds such as circumvention necessarily fell within the lords' jurisdiction? Or is the mention of circumvention simply a way of stating that there is a *prima facie* case for reduction?

In what terms did the lords assert their jurisdiction in the nine other cases? In *Adam Hopper v. Janet Turing and William Adamson* we do not even have a record of a sentence interlocutor by the lords.¹⁴ In *The King v. John Crichton & Ninian Seton* a simple assertion of jurisdictional competence is not elaborated upon.¹⁵ In *Janet Rowit v. Alison Ruche* we find the apparently more limited statement that they are competent judges to the said matter 'as it comes befor thaime'.¹⁶ In *Alexander Innes v. Alexander Ogilvy* the lords state that 'thai ar competent juges anent the sumondis aboune writtin as it is libellit and causis contenit thirintill libellit apounis falsat'.¹⁷ In *Alexander Innes v. Lord Oliphant* there is an allegation that the lords are not competent judges but this does not seem to have been treated as an exception since no sentence interlocutor is recorded. In the

¹²SRO CS 5/42, f.46v.

¹³SRO CS 5/42, f.93.

¹⁴SRO CS 5/40, f.74r.

¹⁵SRO CS 5/40, f.81v.

¹⁶SRO CS 5/41, f.4.

¹⁷SRO CS 5/42, f.40.

case of *Helen Rutherford v. Mark Kerr* the lords seem to make another qualified assertion by decerning themselves competent judges 'becaus the said Mark bound himself be his obligatioun [to Helen]...geif he failzeit therein the bonde to turn to the said Helene'.¹⁸ In *Wigtown v. Whithorn* nothing is said beyond stating that the lords are competent judges notwithstanding the exception.¹⁹ The same is true of *Thomas Duddingston v. Steven Duddingston*.²⁰ Finally, in *The King and Prebendaries of Crieff v. William Drummond* the allegation is made that the lords are not competent judges, but the action is continued, so it would seem that procedurally the exception had not yet been formally pleaded. The action had not yet been called again by 5th May, to which date it had been continued.

In these cases we do not meet with blanket assertions of jurisdiction, and when explanatory reasoning is given or hinted at it tends to rely upon particular features of the action rather than identifying the action as within a general class of actions which the lords will hear, such as 'reduction of infeftments'. This was not the case by the time of *Wemyss*, as we have seen. On the other hand, the impression of relying upon limited particular circumstances to establish jurisdiction in a case is off-set by the fact that in several cases no reasoning at all is given and the record reveals merely that the lords considered themselves competent judges. We should also remember that there is no way of knowing to what extent the record can be relied upon to reveal with any precision what the lords thought or said in court when reaching their decision, or even whether they took a direct interest in formulating the way their decisions were expressed in the register. However, in evaluating the lords' attitude to their jurisdiction over heritage and limitations upon it, in comparison with the attitude they had in the later fifteenth century, it would seem that in formal terms

¹⁸SRO CS 5/42, f.119r.

¹⁹SRO CS 6/2, f.19r.

²⁰SRO CS 6/2, f.219.

the lords recognised that their jurisdiction was still theoretically limited, at least insofar as the evidence of fee and heritage exceptions is taken into account. However, the fact that no cases were remitted to the judge ordinary and that the exceptions almost all related to the reduction of infeftments seems to bear out the suggestion that some sort of jurisdictional impasse had been reached, whereby the jurisdictional restriction was still in place but as a matter of practice there seemed no longer to be circumstances in which the restriction would necessarily be held to apply. The impasse is symbolised by the paradox that all attempts to make the lords decline jurisdiction over heritage from 1529-34 were in cases which happened to relate to reduction of infeftments which was a category of action traditionally taken before council, and which within a further decade was held to pertain exclusively to the lords' jurisdiction. It must be significant that this was also the period where, as we have noted, a judicial 'activism' is apparent in the development of a number of exclusive jurisdictions by the lords of session. Nevertheless, even by 1529-34 the exercise of council's jurisdiction over reduction of infeftments seems to have grown somewhat since the early years of the sixteenth century, and this development will now be assessed.

Actions for the reduction of infeftments

The late fifteenth-century record would not have suggested that this class of action was an especially important one in proceedings before council, and certainly not a common one. Council's main business in reducing infeftments occurred in the course of deciding upon summonses of error, in which the retour of an inquest serving an heir to lands would be declared invalid so that the ensuing infeftment of the putative heir would also be rendered invalid. In the remainder of this chapter the record of council decisions from 1529 to 1534 which involve the reduction of an

infetment will be examined in order to assess whether such actions had become more common, and, if so, whether this had any significance, particularly in relation to the traditional jurisdictional restriction over fee and heritage actions. The grounds upon which such actions proceeded will be described in order to demonstrate the width of application of such grounds, and a comparison made with the later fifteenth-century evidence. Finally, the extent to which such actions could be used as a means to resolve disputes over heritage without contravening the traditional jurisdictional restrictions will be assessed.

It has already been noted that during the period 1466-1506 actions simply for the reduction of infetments were uncommon. By comparison, a sizeable number of such actions was raised between March 1529 and May 1534, amounting to thirty-six actions in total. The distribution of these actions over the five calendar years 1529-34 (dated according to the first formal record of proceedings which were noted in the register) was 7, 7, 5, 7 and 9. Actions for error are not included in these figures, but only actions where the principal determination sought was the reduction of an infetment. In error actions the focus was on the deliberations of the inquest and the procedures surrounding these, and it was the decision of the inquest rather than a flaw in the transfer of the land which was being attacked. Moreover, error formed a distinct category of action which was as prevalent in the fifteenth century as the sixteenth, and so it seems potentially misleading to include such actions in the present survey.

Although reduction of infetment actions from 1529-34 are not very numerous in comparison with the probable numbers of some other actions such as spuilzie or wrongous occupation, it should not be inferred from this that it was an

unimportant type of action. The number of disputes which related to heritable title was never large when compared with disputes which could be resolved through a possessory action. This was to some extent evident in the chapter on the period 1466-1506, in that the number of cases remitted to the judge ordinary in any given year was small, although this is obviously in part because actions to resolve heritage disputes directly should not have been raised before council in the first place at that time. Accepting, though, that one would therefore expect the number of reduction of infeftment actions to be quite low, what becomes significant about the years 1529-34 is that in relative terms there would seem to be an increase in the frequency and regularity of such cases, compared to the later fifteenth century. If the session sat for about one hundred days in a year between 1529 and 1534, we can see that there were enough reduction of infeftment actions for one to be called every third week or so. In the early years of the century one has to look hard to find any such actions, but by 1529 they formed a small but regular part of council's judicial business. It was a remedy which was by that time regularly sought from the lords and, as discussed in the last chapter, within a decade they were declaring that it was a remedy which only they could dispense. The nature of such cases from 1529-34 will now be examined, and the particular grounds of reduction which were pleaded before the session. In the light of this examination the question will be discussed whether the reason for the greater importance of such actions by 1529 may have been that they provided a competent procedure and remedy whereby heritage disputes could be resolved before council and session in a way which obviated the old jurisdictional limitations.

Grounds of reduction

Cases which occurred between 1466 and 1506 have already been cited to illustrate grounds which were pleaded for the reduction of infeftments in that period. They

included procedural faults in the serving of briefs and the making of retours; infetment of a third party to defraud a creditor; mistaken inclusion of extraneous lands in an instrument of sasine by a notary; and, in error actions, incorrect findings by inquests as to who died last vested and seised in the fee of lands, or as to the correct valuation or tenure under which lands were held. Given the greater number of such cases between 1529 and 1534 it is perhaps to be expected that a wider range of such grounds would be in evidence, and this is the case. But the presence of a wide range of grounds, as well as greater numbers of such cases, implies that the reduction of infetment action was not just a narrowly applied one which could be used in a few limited situations, but rather was one which could be used across a whole spectrum of disputes over title in order to resolve contested claims.

Out of the thirty-six cases there are nine in which no grounds are stated in the record, but from the remaining twenty-seven it is possible to distinguish fourteen separate grounds of action used in requesting this remedy. However, these grounds fall roughly into one of four categories, within which the grounds exemplify a common principle.

The two main categories relate to situations where someone was infet in lands invalidly, either because his claim to be infet was without right, or because the granter of the title had been himself without right. A third and further category relates to the fraudulent infetment of a third party to frustrate a future rightful claim to the lands in question. There is also a fourth category in which the infetment is said to be invalidated by the failure of the new holder to perform a previously specified obligation in return. Together these grounds of action, when put alongside the customary grounds used in error actions, seem to encompass the full range of situations in which an infetment might be invalid or vitiated. Therefore, the variety

of grounds evident between 1529 and 1534 shows that the theoretical competence to reduce infeftments which council had always had was now being very widely applied in a way which had not been evident between 1466 and 1506.

Before considering the individual grounds of action exemplified in these cases, the nature of the nine cases in which no grounds are recorded will be described. In *The King v. Alexander, Lord Livingstone* in May 1529, nothing is revealed about the nature of the action at all beyond the fact that it is for the reduction of an instrument of sasine.²¹ In *Thomas Duddingston v. Steven Duddingston* in July 1533 all that is revealed is that it is for reduction of an infeftment of 1524.²² Of the other cases, two concern non-entries, in which the pursuer's claim for the casualty of non-entry for certain lands is met by the production by the defender of an instrument purporting to prove that sasine of the lands had been taken.²³ Two other actions are simply for the reduction of charters or resignations and the subsequent infeftments.²⁴ Two further cases relate specifically to infeftments in annualrents.²⁵ Finally, there is the case of *George, Earl of Rothes v. Robert Lumsden* in July 1533 in which the earl apparently wished to reduce the infeftment of his vassal Robert Lumsden. However, the lords declared that the summons was 'generale' and that 'ane speciale decrete couth not be gevin thirupon'.²⁶ The earl's procurator then intimated that the earl would require Robert to come in person the following morning and show to him as his overlord his 'auld' infeftment

²¹SRO CS 5/40, f.20.

²²SRO CS 6/2, f.219.

²³*James Kennedy v. John Mure*, 10 Feb. 1530/31; SRO CS 5/42, f.45r. *The King v. Janet and Marion Cathcart*, 21 June 1532; SRO CS 6/1, f. 36v.

²⁴*The King and Sir John Paterson and James Gordon, prebendaries of Crieff and canons of the Chapel Royal at Stirling v. William Drummond*, 13 March 1533/34; SRO CS 6/4, f.65v. *John Fiff v. George Heukers*, 18 March 1533/34; SRO CS 6/4, f.93v.

²⁵*Robert Berton and Thomas Erskin, Secretary v. Sir John Carmano and George Bishop of Dunkeld*, 19 July, 1533; SRO CS 6/3, f.31v. *John Gledstanis v. Andro Douglas*, 7 May, 1534; SRO CS 6/4, f.126v.

²⁶SRO CS 6/3, f.18v.

and receive from him a new infeftment 'conforme to his auld infeftment', protesting otherwise for the non-entries of the lands. Unfortunately, the grounds for reduction are never stated and Robert failed to compear the next day.²⁷

Particular grounds for reduction

(i) Invalidity due to infeftment without right in granter

There are seven grounds in this category. The first ground to be discussed is exemplified in three cases where the granter of a heritable fee was in fact the holder only of the franktenement or the conjunct fee in the land. The first arose in August 1529, and was an action raised on behalf of the king against John Crichton of Strathurd and Ninian Seton of Tullibody, and was directed towards establishing the king's claims to the casualty of non-entry for these lands. The claim would be established if a resignation, charter and infeftment, dating apparently from 1438, could be reduced as invalid. Alexander, earl of Huntly, had resigned the lands of Tullibody into the hands of the king, James II, so that Ninian's ancestor, Alexander Seton, could receive infeftment.²⁸ However, it was successfully argued that at the time of the resignation the earl 'was allanerlie coniunctfiar with hir [i.e. his spouse] of the same and sua at that time mycht nocht resigne the heretable fee of the saidis land', since the earl's spouse, Dame Gelis Hay, was the 'heretar' of the lands. The resignation and infeftment were accordingly reduced. This meant that the lands had been in non-entry for fifty years since the death of the earl of Huntly.

Over four years later, in December 1533, we find the earl of Huntly raising an action to reduce this decree of the lords, arguing that in relation to the reduction

²⁷SRO CS 6/3, f.27.

²⁸SRO CS 5/40, f.84v.

the cause 'wes nocht of verite becaus the said umqhile Alexander erle of Huntlie the tyme of the resignation of the saidis landis wes heretar thirof and heretablie infest in the same', entailing that the resignation in favour of Alexander Seton was 'gud and lauchfull in the self'.²⁹ However, this action failed. Perhaps somewhat inconsistently, though, the earl had meanwhile lodged in court a charter made by Gelis Hay in 1438 to Alexander Seton of the lands of Tullibody, confirmed by James II and in 1505 by James IV. Two weeks later the earl compeared to receive a transumpt of the charter.³⁰ Perhaps he was preparing the way for another action to reduce the decree of non-entry by showing that there existed another infestment of Alexander Seton which remained valid.

The possibility of the decree of non-entry being reduced was of concern to John Crichton of Strathurd, since in 1529 the king had proceeded to infest him in the lands of Tullibody which Ninian Seton had lost.³¹ However, at the same time, Ninian Seton was attempting to reduce the process of apprising which had led to John Crichton's infestment.³² The basis of Ninian's action was in part his own claim to have had a gift of the non-entries back in 1527. The process of apprising was reduced at Ninian's instance, although the reason was said to be for the 'wrongus iniust and inordinat proceeding' of the sheriff, and the lords specifically held back from expressing a view about the claims to non-entries, stating that 'this decrete mak nowther strenth nor prejudice to any of the saidis partiis rytis be reson of the said pretendit gift of the non-entries....'.³³ That these actions were also of great concern to the tenants of the lands in dispute is shown by an action raised by some of John Crichton's tenants in January 1529/30, against both John Crichton and Ninian Seton.

²⁹2 Dec. 1533, SRO CS 6/3, f.105v.

³⁰SRO CS 6/3, f.93v, f.122v.

³¹SRO CS 6/3, f.93v.

³²4 Dec. 1533, SRO CS 6/3 f.111v.; 10 Dec. 1533, SRO CS 6/3, f.118; 11 Dec. 1533, SRO CS 6/3, f.123r.

³³SRO CS 6/3, f.124v.

They complained that they were 'double poindit' and that Ninian had spuilzied them for mails and duties which they owed to John. John and Ninian were to bring with them 'baith their rychte quhy thai poynd the saide pure tenantes for double mailles'.³⁴

None of these examples was a fee and heritage action, although we saw previously that John Crichton had unsuccessfully alleged that the king's action for non-entries was such an action and therefore beyond the jurisdiction of council. However, in none of them were two competing claims pitted against each other. Nevertheless, the complexity of the various claims, and the ways in which these claims were pursued or attacked over the course of many years through different actions and stages of litigation, make it easy to envisage how the facts of these disputes could have given rise to competing heritable claims made in the course of actions of wrongous occupation or spuilzie of mails. More straightforwardly, though, the reduction of infestment action shows the lords being prepared to look behind a heritable title to the transactions which brought it into being, and to declare it null on the basis of an invalidity in its transfer over ninety years earlier. It should be noted that the dispute over this land did not break out into litigation for the first time only in 1529: an earlier wave of litigation can be traced in 1505, for example.³⁵

Another action exemplifying this ground arose in November 1531 when Margaret and Marion Inglis, daughters and heirs of Margaret Drummond, Lady Colquhoun, sued Melchior Cullen for reduction of an infestment of lands made to Melchior's father, Jasper, by Lord Erskine, the superior, after an 'assignation' into his hands by Margaret Drummond.³⁶ The ground of reduction was that 'befor the said infestment making of the said landis be the said Lord Erskine thirof quhilk be virtue

³⁴SRO CS 5/40, f.153r.

³⁵SRO CS 5/18(1), ff. 90v, 91v, 92r., 121r., 132r.. Cf. SRO transcript pp.178, 181-2, 232, 254.

³⁶SRO CS 5/43, f.95.

thirof gaif heretable stait of the saidis landis to the said umquhile Margaret Drummond and to Jhone Inglis than hir spous and their airs, failing whereof to Jhone Inglis aires, quharthrow the heretable fee was transferrit in the said Jhone Inglis³⁷ and thus Margaret was 'secludid fra all maner of resignation or alienation thirof and...denudid of the heritable fee...and the conjunct fee remanent with hir alanerallie'.³⁸

The third action exemplifying this ground occurred in November 1532 when William, master of Glencairn, sued Janet Langmuir and her sisters for reduction of an infeftment, charter and precept of sasine given to them by William's father, Cuthbert, earl of Glencairn, to which infeftment William was also alleged to have been a party.³⁹ The principal ground of reduction was that Cuthbert 'had na power thirto nor mycht not give the same nor infeft na personis heretable thirintill he beand at youth as he was in verite distitut of the heretable fee...and alanerlie wes but franktenementar and William master of Glencairn in heretable fee', William denying that he had ever consented to this or made the infeftment himself.⁴⁰ Again, it is possible to see how a fee and heritage action could have arisen out of these circumstances, since Janet Langmuir and her sisters had a *prima facie* valid heritable infeftment, and so it seems did William, master of Glencairn. In this case, although we do not know the arguments, William failed to prove his case and the Langmuir sisters were assoilzied.

The next ground of reduction to consider relates to a situation where the granter wrongly claimed the right to transfer land which was not part of his own infeftment. The main example of this is found in the action raised by Archibald

³⁷Ibid.

³⁸SRO CS 6/1, f.86.

³⁹SRO CS 6/2, f.14r.

⁴⁰20 Feb. 1532/33; SRO CS 6/2, f. 96.

Spittal against Finlay Spittal in February 1530/31, for reduction of an infeftment, charter and sasine made by the king to Thomas Spittal, Finlay's father, and the subsequent sasine now taken by Finlay. The reason put forward for the reduction was that 'long befor the said pretendit infeftment maid to the said umquhile Thomas the said Archibald was heretably infest in fifty shilling land in Cessintuly quarof the said 10 merkland is ane part and pendikle...the said Thomas by sinister information circumnevand the kinges grace, nocht makand mention of the same, optenit ane preteindit infeftment and als the pretendit seising now takin thereof be the said Finlaw his son and ar be the common law null in the self'.⁴¹ In order to prove whether the ten-shilling land was part of the fifty merklands, the lords commissioned the Steward of Menteith to take cognition, and on the 29th April 1531 the infeftment was reduced, since all the land pertained to Archibald, 'as wes clearlie previt befor the saidis lordis be ane rolment of court producit be the said archibald gevin be the steward of menteith'.⁴²

Again, it is apparent that the facts of this case could easily have given rise to a fee and heritage action with two competing titles and which would have been open to being remitted to the judge ordinary a few decades earlier. Both parties could lay claim to the ten-shilling lands, and it was not apparent from the face of Archibald's charter whether or not they pertained to his property. In fact, a year after the original action of reduction was called, we find in February 1531/32 a new action raised by Archibald against Finlay in relation to precisely the same lands, this time for wrongous occupation. In the record of the new action the previous proceedings leading to the reduction of Finlay's infeftment are related, before the new allegation is made that 'nochtheless the said Finlay and Janet his modir wrangously and by way of deid intromettis and occupyis the said land & will nocht decist thirfra without thai

⁴¹SRO CS 5/42, f.48r.

⁴²SRO CS 5/42, f.172v.

be compellit'.⁴³ Finlay and Janet did not compear but were ordered to desist and cease from occupation of the lands. These proceedings therefore provide an exact illustration of how the fee and heritage restriction might have been obviated through the use of a reduction of infeftment action. Archibald's first act was to establish an undisputed title for himself through reducing Finlay's infeftment, and his second to remove Finlay through a wrongous occupation action to which Finlay would have no defence since his previous title to the land had been reduced.

The other example of this ground is provided by litigation between the earl of Glencairn as franktenement, the master of Glencairn as fiar, and Margaret Campbell as relict of the late William Cunningham and conjunct fiar of the lands of Cluny against William Hamilton, concerning the lands of Cluny. The earl and others had a summons against William Hamilton 'tuching the land of clune',⁴⁴ whilst William Hamilton had a summons against them for reduction of their infeftment of the lands of Cluny which had been made by James IV in 1498 to the master of Glencairn. The summons for reduction was called again on 5th March 1532/33, but the defenders pleaded an exception that the lands of Cluny were a pertinent of the lordship of Kilmaurs, in which the earl and master and their predecessors were infeft.⁴⁵ We are told that William Hamilton's claim arises from a process of apprising for the non-entries of the lands of Cluny, the gift of which non-entries he had presumably received from the king. And it is presumably this process of apprising which in November 1532 we find the earl and others trying to reduce. Unfortunately, we do not know for certain the ground of reduction pleaded by William in relation to the infeftment of 1498, but it seems apparent that the issue was in part whether the lands of Cluny were part of the lordship of Kilmaurs, and

⁴³SRO CS 5/43, f.160v.

⁴⁴8 Feb. 1531/32, SRO CS 5/43, f.147r.

⁴⁵SRO CS 6/2, f.108.

this was an issue which the lords would determine in order to decide whether to reduce the infeftment. Both sides can be seen attacking the title of the other in separate actions, success in which would presumably have allowed them to establish a right to lawful possession of the lands, if necessary through an action of wrongful occupation, as happened in the Spittal case.

The next ground to be considered in this first category relates to the situation where the granter of an infeftment himself held the title on the basis of an invalid process of apprising. Such circumstances underlay an action in 1531 between Alexander Innes and Alexander Ogilvy, William Stewart and Adam Otterburn (as king's advocate). Alexander Innes' action related to an infeftment, charter and gift, with precept and sasine, made by James IV to James Stewart of lands which were in his hands 'be virtue of ane pretendit apprising maid to him of the same be reason of nonentres'.⁴⁶ The ground for reduction was that James IV 'had na rycht' to the mails for which the lands were appraised at that time, and 'divers sufficient acquittance of payment' were produced. This meant that the allegation that the lands were in non-entry 'was nevir of verite and swa the fundimant of the said infeftment quharupon it procedit was fals and fenzeit in the self qhwarfor our said soverane lord had na rycht to the said landes and fisching and mycht nocht dispone the same'.⁴⁷ In fact the reduction action was abandoned because the parties submitted the dispute to the lords as arbiters, who allowed Alexander Ogilvy to retain the lands in return for paying compensation of 600 marks.⁴⁸ However, the case is another telling illustration of how a complex dispute over title might arise and how the remedy to which the complainer might resort to resolve such a dispute was the reduction of his antagonist's infeftment.

⁴⁶19 Dec. 1531, SRO CS 5/43, f.134r.

⁴⁷27 Feb. 1531/32, SRO CS 5/43, f.173.

⁴⁸Ibid.

The next two grounds in this category both relate to crown property. First, there is the reduction of infeftments which were made by the king in his minority without the advice and consent of parliament, and which therefore fall under the general revocation of such grants. Thus in February 1532/33 the king and his comptroller sued Robert Hunter on this ground, and because the land was 'in all tymes bigane fre forest and fens for the kingis grace & his predecessors wyld bestis & nevir was sett in assedation of befor and now ar sett in assedation for 5mk of few allanerlie howbeit thai ar worth 30 marks yeirle...'.⁴⁹ A related ground of action in *The King v. James Crichton of Frendraught* in 1529/30 was that a charter and infeftment of feu of crown lands should be reduced and James decerned to have 'tynt' his fee and heritage because the charter was made in diminution of the king's 'rental'.⁵⁰ Also, in February 1532/33 the king's advocate pursued the earl of Morton for reduction of a charter of feuferme made by the king because it had been made in his minority and to the diminution of his 'rentale'.⁵¹ These two grounds of action are perhaps slightly distinguishable from the others, in that they relate to king's actions of the sort which it must always have been the business of the king's officers to pursue on his behalf before council. By 1529, however, such actions represented but one part of the lords' generally applied jurisdiction to reduce infeftments. What may have been a remedy once applied for the benefit of the king had by this period achieved a more general utility.

The final two grounds in this category are more narrowly technical in nature. The first instance is where infeftment was made after a resignation to someone who was not in fact the superior of the lands but who then made a re-grant. In March 1532/33 John Scrimgeour, 'heretable possessour' of the lands of Nether Myres sued

⁴⁹SRO CS 6/2 f.99v.

⁵⁰SRO CS 5/40, f.157v.

⁵¹SRO CS 6/2, f.101r.

Alexander Scrimgeour, his son and apparent heir for reduction of an infeftment and instrument of sasine of the lands of Nether Myres made into the hands of the bailie of Auchtermuchty in 1520.⁵² John was ordered to produce his 'auld infeftment' along with the erection of the burgh of Auchtermuchty as a free burgh. On 23rd June 1533 the sasine of Alexander was reduced because the resignation had been into the hands of the bailie, 'he havand na power to ressave the said resignation, but the same suld have bene resignit in our souveraine lordes handes befor the geving of any new infeftment thirof considering the sadis landis ar not haldin of our souveraine lord be reson of fre borrewage nor yit lyis within the freedom of the said burgh but ar haldin of our souveraine lord by uther service'.⁵³

Secondly, there is the ground of reduction arising from a variation between a transumpt of an instrument of sasine and the record of it contained in the protocol book from which the transumpt was taken. Such a ground supported James Douglas of Parkhead's action against Margaret Allan and her spouse John Stanehop in 1531. James Douglas was pursuing an action for non-entries, but Margaret produced a transumpt of the record of an instrument of sasine which must have purported to show that entry had been taken of the lands.⁵⁴ However, in January 1531/32 James proved the transumpt false 'because the same is variant fra the prothogoll productit befor the saidis lordis of year 1492 and in transsumpt the year 1488'.⁵⁵ Having 'improved' this instrument, James Douglas was then awarded possession of the lands by virtue of his gift of non-entries when the question of the ground right came up on 4th June 1532. We are informed that he received this gift from the earl of Angus in 1518.⁵⁶

⁵²SRO CS 6/2, f.136.

⁵³SRO CS 6/2, f.200.

⁵⁴SRO CS 5/43, f.121r.

⁵⁵SRO CS 5/43, f.140.

⁵⁶SRO CS 6/1, f.12v.

Both of these actions show how instruments which were intrinsically invalid could nevertheless come into existence and be used to support a heritable claim, and how the jurisdiction of council to reduce infeftments could be deployed to provide a remedy whereby such claims could be rendered void. Suppose, for example, that John and Alexander Scrimgeour had fallen into dispute with one another over the lands of Nether Myres. Both would have been able to produce heritable titles to the land - Alexander his infeftment at the hands of the bailie of Auchtermuchty, and John his 'auld' infeftment. Would not an action of wrongous occupation between them have had to have been referred to the judge ordinary under the traditional jurisdictional rules which we can see being applied in the late fifteenth century? By raising a reduction of infeftment action, though, litigants were able to attack their opponent's title separately, before moving on to attack their possession of property. The evidence being considered in this chapter would seem to suggest that this pattern of litigation had become more common by 1529-34, and that litigants were adopting a more sophisticated approach to the remedies they sought (no doubt on the advice of the professional men of law who undertook much procuratorial work in the session by this time) in order that the whole course of a dispute about heritage could be carried through before the lords. Certainly, title was now being attacked directly more often than heritage actions in the past had ever been remitted to the judge ordinary.

(ii) Invalidity due to infeftment without right in grantee

The second category of grounds for reduction relates to cases where someone gained entry to lands without duly established 'right', and there are five specific grounds exemplified in the nine cases which fall into this category between 1529 and 1534. The first is represented by the case of *Agnes Lindsay v. The King* for reduction of an

infestment made by James IV to John Lindsay, the second son of Gilbert Lindsay of Glenmure. Agnes was the daughter of Alan Lindsay, Gilbert's son and heir, and she wished to reduce John's infestment because it was 'in defraude, hurt and disherising of the said Agnes'. She also wished the lords to decern that by decree she should be infest by the king in the same land as the lawful heir.⁵⁷ Unfortunately, we discover no more in the record about how these circumstances came to arise.

A second ground of reduction is illustrated by three cases which concern infestments given without 'coursable' briefes or 'cognition in the cause', in other words without the requisite formality of judicial process before an inquest. In November 1529, Sir Alexander Elphinstone, brother and heir of tailzie to the late Andrew Elphinstone of Selms, sued Marion Elphinstone, daughter and heir of line to the late Andrew. An instrument of sasine of Marion's was to be reduced 'because the same wes privatlie gevin to hir as air of lyne thirof without brevis coursable and cognition in the cause'.⁵⁸ In the second of these examples, in February 1530/31, *Alison Ruche v. Janet Rowit and William Wallace*, it is difficult to infer from the record what the wider context was, but the ground of action was that an instrument of sasine be reduced 'becaus the said pretendit seising...wes gevin without cognition in the caus nocht expremand ony manner of rycht throw the quhilk the same wes gevin to him nowther as ayre therof to the said umquhile Laurence hes fadir nor to any uthir person, nor zit be resignation of any person, and by the stile and ordour of geving of seisingis within borrowis observit & keipit in siclik causis past memor of man...'.⁵⁹

⁵⁷4th August 1529, SRO CS 5/40, f.82v.

⁵⁸SRO CS 5/40, f.135.

⁵⁹SRO CS 5/42, f.31v.

The third example of this sort of case is the action raised in December 1531 by Gelis Berclay against Thomas Alison and the archbishop of Glasgow. Gelis wished an infetment given to Marion Gibson, Thomas' mother and whose heir he was, to be reduced 'becaus the said pretendit seising wes gevin privatly be ane precept [i.e. of the archbishop]...without brevis cursable and eftir that the said Gelis had optenit ane decret of wilfull error apoun the persons thirof of before had retourit the said umquhile Marion nerrest and lauchful air to said umquhile Margaret of the saidis landis and swa without cognition in the caus the pley beand dependand betwix thaim quha suld succeid'.⁶⁰ In turn, Gelis alleged David Berclay, to whom she was the heir, to have received infetment in the lands, and produced an instrument of sasine of 1505 to show this. On 4th June 1532 the lords accepted the validity of this infetment and reduced that of Marion Gibson. Marion's procurator had offered to prove Gelis' instrument false, but had obviously failed to do so. Perhaps not technically, but at least functionally the lords were therefore coming very close to deciding a question of fee and heritage of the sort still apparently beyond their jurisdiction. They reduced one instrument of sasine and upheld the right of Gelis to succeed as heir to the lands in question on the basis of a separate instrument of sasine whose validity the lords accepted.

The third ground in this category is exemplified in the case of *Nichol Crawford v. Andrew Hay* in February 1533/34, in which Nichol successfully sought reduction of Andrew's infetment. The reason was that, ostensibly, Andrew had been infet by the superior after the form of charter and 'auld infetment' which had pertained to his predecessors. But this made him 'heretor heretablie succedand to his predecessors heritage..howbeit the said Andro is be the law ane person unhabill to succeid to the heritage of ony of his predecessouris and specialie to his said fader

⁶⁰SRO CS 5/43, f.125 v.

becaus he is ane bastard gottin and born in bastardy...betwix Sir Thomas and Marion Forestar his concubyn eftir his promotion to the ordour of prestheid...'.⁶¹ Nichol, who incidentally was the justice clerk, is described as having the land of Howburn 'tenend and tenendrys, in heritage'. Andrew had been infeft in an acre of land of the landis of Howburn, implying that Nichol had now acquired this land. Presuming that he had done so, it is easy to see how a fee and heritage action could have arisen, and how the reduction of infeftment action permanently averted such a prospect.

The fourth ground for reduction within this category is when an infeftment derived from a false claim to have held the lands in question prior to the forfeiture of the superior of the lands, particularly when sasine had already been given through the re-entry of the rightful heir. The first example of this is William Kerr's summons against Patrick Murray in January 1530/31, for 'impreving' and reduction of an instrument of sasine. William's son, Adam, held certain lands of the earl of Angus in heritage. After the forfeiture of the earl in 1528, Adam had been re-entered to his lands, reserving a liferent to his father, William, and he took sasine on 12 September 1528, one week after the doom of forfeiture had been given in parliament.⁶² However, Patrick's father, James, had alleged that the lands had pertained to him in heritage before the forfeiture, and on that basis obtained a gift of the lands from the king, and now there was allegedly 'ane fenzeit and fals instrument of sesing gevin be Sir Jhone Michechill notar thirupon of the dait the 8 September with ane antedait befor the sesing takin be the said William and his son'.⁶³ However, 'all the cuntre knawis that he [William] and his said son gat seising thereof 24 days befor the pretendit seising takin be the said umquhile James'.⁶⁴ Patrick was ordered to produce

⁶¹SRO CS 6/3, f.215; SRO CS 6/4, f. 59.

⁶²*The Acts of the Parliament of Scotland*, ed. T. Thomson and C. Innes (12 vols., Edinburgh, 1814-75), vol. ii, p.326.

⁶³SRO CS 5/42, f.23r.

⁶⁴*Ibid.*

the instrument, but on 10th February 1530/31 the lords declared it 'fra the begynning and to be now and in all tymis to cum of nane availe force nor effect but fals and fenzeit in the self'. In fact, another instrument of 6th October 1528 was produced by Sir John Mitchell, who declared that no other instrument had been made by him for these lands prior to that date.⁶⁵

This dispute seems very close to a fee and heritage action, since there were two competing titles in the form of instruments of sasine taken in relation to the same land. The primary issue concerned the question which was given first. However, one possible way of distinguishing this situation from a fee and heritage action proper might be that in this example only one of the parties, William, appeared to possess sasine himself. Patrick Murray is said to be son and heir to the late James Murray, but it is the instrument of the sasine which James allegedly took of the land which is reduced, and we are never told whether Patrick had tried to take sasine on the basis of James' title. Obviously, though, if Patrick had sasine, then the ground for reducing it would still have been the invalidity of his father's title, and so the substance of the action would have been identical to the action which did ensue. Nevertheless, this action again illustrates how a litigant could approach what was essentially a dispute about heritage through trying to have the infestment of his opponent reduced.

Another case illustrates the same ground in slightly different circumstances. In February 1530/31 Duncan McKelly, son and heir of Thomas McKelly, sued John Muirhead and Adam Otterburn (as king's advocate) for the 'pretendit infestment' made to John Muirhead's father by James IV to 'be annullit be decrete of the lordis'.⁶⁶ The reason was because the land had pertained, before the recognition of the barony

⁶⁵SRO CS 5/42, f. 44r.

⁶⁶SRO CS 5/42, f. 76r.

of Merton into the hands of James IV and its subsequent forfeiture, to the late Thomas McKelly in property, he being heritably infest by charter and sasine. As such it should now pertain to Duncan, given that all vassals and subvassals were to be infest in their property and tenandry after the forfeiture as of before 'ilkane in thir part payand thir part of the composition lik as the said Duncan offirit'.⁶⁷ However, after the lands had been recognosced and doom of property given, John Muirhead 'be sinister information allegiand the same land befor the forfaltour perteint to him in propirtie [and] optenit new infestment to him of the same the said Duncaine beand of less age and in keping of the said Johne as he that had hes ward'.⁶⁸ The lords reduced the infestment and thus we see them invalidating sasine on the basis that there was no rightful title underlying it.

The fifth and final ground in this category is the reduction of an infestment because it encroached on the bounds and freedoms of a burgh which had not consented to the encroachment. This is exemplified in the case which arose between the burghs of Wigtown and Whithorn in 1532. Wigtown sought the reduction of the charter and infestment made to Whithorn by James IV. The reason was that 'the toun of Wigtoun wes maid and creat be umquhile king James the second and utheris our soverane lordis predecessoris kingis of Scotland ane fre burgh with all privileges and freedoms of fre burghs within all the boundis of Quhithorn and Galloway...and the inhabitantes of the said burgh hes bene in possession of the said fredome past memor of man quhair thirthrow our said umquhile soveraine lord mycht not tak fra the inhabitaris of the said burgh thair fredom without thair avis and consent and gif the same to the town of quhithorn', which consent we are told they never gave and never will give.⁶⁹ Although Whithorn is assoilzied, it is interesting to find the same action

⁶⁷Ibid.

⁶⁸Ibid.

⁶⁹SRO CS 6/2, f. 94.

raised again over a year later in March 1533/34.⁷⁰ To adjudicate on this reduction action seems particularly close to deciding fee and heritage, since the reason for reducing the defender's title would be that it conflicts directly with that of the pursuer. Therefore a comparison of the two conflicting titles would have to be made by the lords. And indeed at the outset of the proceedings on 2nd December 1532 an exception was pleaded that the lords 'ar na competent juges in the said mater', which submission was rejected by the lords.⁷¹ Perhaps it can then be said that this case illustrates particularly well how a dispute which was in substance one over fee and heritage could nevertheless be adjudicated upon by the lords through their jurisdiction to reduce infeftments.

(iii) Invalidity due to fraudulent infeftment

The third category of grounds for reduction of infeftments concerns the fraudulent infeftment of a third party in order to defeat a future rightful claim to the land in question. There are five cases of this type which concern an infeftment made in order to defraud a creditor, and one in order to defraud a spouse in advance of divorce proceedings. For example, in March 1529/30, Alexander Innes sued Lord Oliphant for the reduction of his infeftment in various lands, including charter, sasine and confirmation. This was because the property had been alienated by Andrew Oliphant to Lord Oliphant, 'his tendir kinsman in secund and third degrees of consanguinite', in defraud of Alexander as Andrew's creditor. A crucial point seems to have been that this occurred 'lang eftir that the said umquhile Andro as air and successor to umquhile Constance Sutherland hes modir was under sumondis befor the lordis of counsale' at Alexander's instance, he being assignee to the casualty of marriage which had been incurred by Constance's marriage. In other

⁷⁰SRO CS 6/4, f. 71.

⁷¹SRO CS 6/2, f.19.

words, prior to the alienation, a claim had already been made against the property, although not attached to any security in the modern sense, and the alienation left Andrew being 'not responsale nor distrenzeable' in other lands or goods for the considerable sum of five thousand merks.⁷²

In another case in 1530, Sir Alexander Scott had resigned lands to his son, William, after decree had already been given by the official of Lothian for a debt of £100 owed to Rolland Donaldson. Moreover, there had been 'opin proclamatioun apoun our soveraine lords letters lang befor the said alienatioun that the said Alexander suld nocht analyt nor put away hes land nor gudes in fraud nor prejudice of said Rolland Donaldson'.⁷³ Thus the infestment was 'in fraude of the creditour' and was reduced, and the land appraised. Actions of this sort were effectively forms of diligence, whereby creditors enforced their decrees by means of reducing fraudulent alienations, before appraising the property in the same action. Appraising also followed reduction in *Marjory Mowat v. Walter Kynnard*.⁷⁴

In another case the fraudulent infestment appears to have been made to evade claims of warrandice against the granter, but here the allegation was that the newly infest proprietor was in bad faith. It was alleged that Gilbert Inglis 'knewand perfittly' that his brother John was liable in warrandice to Margaret Allan, and knew that at the time of the fraudulent alienation John was not 'responsale' in other lands. There is also a hint that Gilbert had pretended to be purchasing the lands but without making any payment to John.⁷⁵ This alienation occurred in 1512.⁷⁶ In another case of this sort, the session was asked to intervene in a dispute between William Kynard,

⁷²SRO CS 5/41, f.22v.

⁷³SRO CS 5/41, f.53r.

⁷⁴4th May 1531; SRO CS 5/42, f.178v.

⁷⁵SRO CS 6/2, f.166.

⁷⁶SRO CS 6/2, f.118v.

burgess of Dieppe, and Robert Brown, burgess of Edinburgh, and to reduce all infeftments made by Robert's wife in defraud of William, their creditor.⁷⁷

The final example of this ground of reduction relates not to a creditor but a spouse who was about to be 'divorced'. Robert Logan was summoned in March 1533/34 by his ex-wife Janet Logan, to have an infeftment reduced which he had made to his son. This was because it had been made 'eftir that he had movit pley of divorce agains Jonet', knowing that if divorce was granted 'he wald be condampnit be the same sentence to refund all the sums that he ressavit with her'.⁷⁸ Moreover, after the divorce he then purported to infeft Janet in the same lands in which he had already infeft his son. As a result of this, it would seem that two infeftments existed for the same land, something which would inevitably cause a dispute over the fee and heritage of the land. Again, a reduction of infeftment action would solve the fee and heritage dispute by leaving only one valid title, although in this particular case the defender was assoilzied because the 'punctis' of the summons were not proved as libelled.

(iv) Invalidity due to failure to perform obligation under condition of the grant

Only one example of this ground was found between 1529 and 1534. It concerns a situation where an infeftment is vitiated by the failure to perform an obligation which has been undertaken in return for the infeftment. In March 1530/31 Helen Rutherford appeared in relation to her summons against Mark Kerr, in which he was summoned for 'reducing of an infeftment maid be hir to said Mark of certane landis gevin to him to defend hir in hir heritage. Nochttheless he did na diligence therein bot suffirit Thomas Ruderfurd to occupy her land & castell of Edzarstonne & deit in

⁷⁷SRO CS 6/2, f.218.

⁷⁸SRO CS 6/4 f.78v.

possession thereof'.⁷⁹ Therefore he had not acted 'conforme to the obligatioun' made to Helen in this respect. This case shows a further aspect of the lords' jurisdiction to reduce infeftments, although the facts in this case are not immediately so suggestive of a fee and heritage case as some of the other ones already considered. However, a fee and heritage dispute could have arisen from Helen producing her 'auld infeftment' and setting it against Mark's, which she could allege to be invalid.

Conclusion

The regular number of reduction of infeftment actions by 1529-34 and the considerable variety of grounds pleaded in them suggest that such actions were a particularly significant aspect of the lords' jurisdiction. Although such actions were not technically fee and heritage ones, they nevertheless touched heritage. In the examination of these actions it has been shown how a number of heritage disputes, which could have led to a remit to the judge ordinary and the declining of jurisdiction in the past, here seem to be approached competently using other grounds of action. Such disputes could be adjudicated upon by the lords when the remedy requested was the reduction of an infeftment. The apparent growth in the number of such cases at the same time as the lords appear to have ceased to remit cases to the judge ordinary because of fee and heritage, together with the fact that the fee and heritage exceptions which were made were made in reduction of infeftment actions, implies that litigants and their legal advisers had realised that if heritage disputes were approached on these grounds then the old jurisdictional restriction on council would be circumvented.

⁷⁹SRO CS 5/42, f.124v.

Therefore, through a comprehensive jurisdiction to reduce infeftments the lords were effectively able to settle many typical disputes about heritage, but without any formal repudiation of the old jurisdictional restriction. This is simply a hypothesis, but it has the merit of rendering explicable all the various pieces of evidence which have been surveyed. Crudely put, therefore, the sixteenth-century council developed an important jurisdiction over heritage by means of its jurisdiction to reduce infeftments, and this rendered obsolete the restriction which prevented the fifteenth-century council from hearing actions which depended upon fee and heritage. The development seems to have happened as a result of litigants approaching disputes under different legal grounds, motivated by a desire for a remedy which was available before council, and possibly a preference for its adjudication in general. It could therefore be only a matter of time before the formal recognition occurred that council and session were not barred from deciding fee and heritage. The significance for this development of the foundation of the college of justice in 1532 will be considered in Chapter Six. However, by the 1530s there were other developments outside the formal procedures of council and session which must be taken into account, particularly the use of extraordinary procedures to submit disputes to council as a court or as arbiters, or to have actions advocated from other courts. These developments will form the subject of the next chapter.

Chapter Four

The Role of Council and Session in Dispute Settlement, 1529-1534

Introduction

Any study of a law court must consider the wider social context of dispute settlement. Formal legal remedies were obviously only one means by which a dispute could be resolved, and the pursuit of a court judgement was not necessarily the most effective means of doing so. The question to be addressed in this chapter is how legal remedies related to the other means available, and in particular how a court such as the session could be involved in achieving extra-judicial settlements between parties in dispute.

Dispute settlement, private and public justice

Michael Clanchy has addressed the broad principles underlying dispute settlement when writing that 'law (standing for learning and the application of rules) and love (standing for common sense and bonds of affection) can be seen as contrasting styles in the settlement of disputes in the Middle Ages'.¹ It is the workings of the law which have generally preoccupied historians, but in recent years the role of 'love' in Clanchy's sense of 'a bond of affection, established by public undertakings before

¹M.T. Clanchy, 'Law and Love in the Middle Ages', in *Disputes and Settlements*, ed. J. Bossy (Cambridge, 1983), p.52.

witnesses and upheld by social pressure² has begun to be examined in more depth. Through this means historians have come to realise the extent to which peace and order in medieval and early modern societies depended not just upon public or publicly administered justice delivered by the king and his courts, but also upon private justice negotiated through the agency of lordship, kindred, private arbiters or a combination of all three. The main difference between such private and public modes of justice seems to have been the nature of the settlement achieved. The purpose of a court judgement was to provide a legally correct answer in a dispute and to grant the appropriate remedy to vindicate the rights of one party against another. By contrast, a private settlement was essentially founded upon a measure of compromise so that neither party was left with an outstanding grievance. Furthermore, the sanctions for breach of private settlements and court judgements differed, in that they were social and informal in the former case, and formal and legal in the latter. Defying a court decree could lead to being excluded from the king's 'peace'.

The most telling studies of private justice in fifteenth- and sixteenth-century Scotland have been those of Dr. Jenny Wormald. In a seminal article, 'Bloodfeud, Kindred and Government in Early Modern Scotland', Dr. Wormald attacked the notion that 'public and private order, represented by government and kindred respectively, conflict because they are essentially incompatible'.³ With particular reference to surviving bonds of manrent, maintenance and friendship she demonstrated the 'survival of the private settlement as a customary and practical method of dealing with crime or civil dispute'.⁴ Given that in Scotland people 'sought justice close to home' and that the emphasis was therefore on the 'local

²Ibid., p.47.

³J.M. Wormald, 'Bloodfeud, Kindred and Government in Early Modern Scotland', *Past and Present*, no.87 (1980), p.55.

⁴Ibid., p.72.

settlement', this survival of the private settlement should, she argued, be mainly attributed to its effectiveness in resolving disputes.⁵ In practice it could often be more 'effective' than a court decree.

Three main themes from Dr. Wormald's work are relevant to the subject matter of the present chapter, and are developed by her in an article on the Sandlaw dispute. First, she returned to the theme that 'private settlement was still...a prevalent and effective force in Scottish justice', and was not in conflict with public justice.⁶ The Sandlaw dispute itself illustrated this point, since it was ultimately resolved without invoking public authority,⁷ although court actions had been undertaken during the dispute. Moreover, the evidence of bloodfeud in Scottish society in the sixteenth century supported the same conclusion.⁸

Secondly, it is misleading to draw too sharp a contrast between court actions and private settlements on the basis of formality and authority.⁹ Dr. Wormald argued that 'in terms of its procedures, the dividing line between public and private authority was as blurred as that between criminal and civil justice. The procedure used in the private settlement could very well mirror that of the courts, for arbitration was common in both, and had been at least since the thirteenth century.'¹⁰

Thirdly, Dr. Wormald argued that the sixteenth century was 'the last great age of the private settlement in Scotland', although a clear explanation of this is hard to arrive at.¹¹ Dr. Wormald suggested that men came to prefer 'the greater

⁵J.M. Wormald, 'The Sandlaw Dispute', in *The Settlement of Disputes in Early Medieval Europe*, eds. W. Davies and P. Fouracre (Cambridge, 1986), p.203.

⁶*Ibid.*, p.203.

⁷*Ibid.*, p.202.

⁸K.M. Brown, *Bloodfeud in Scotland* (Edinburgh, 1986), *passim*.

⁹'The Sandlaw Dispute', p.192.

¹⁰*Ibid.*, p.203.

¹¹*Ibid.*, p.205.

elaboration and professionalism of the world of the lawyers and the courts' in resolving their disputes.¹²

These themes contribute to a highly plausible account of dispute settlement in sixteenth-century Scotland. Dr. Wormald's analysis naturally prompts further questions, particularly about the role of law courts in dispute settlement, and in the present context about the role of council and session. The purpose of this chapter is to draw on these themes and to examine private justice in the context of the administration of public justice. It should be possible to assess the extent to which the records of the session bear out Dr. Wormald's thesis that public and private justice did not conflict with each other. In addition, an assessment will be made of the degree of relation and interaction between public and private justice, as demonstrated in proceedings before council and session, and in particular in the active involvement of council and session in the procedures and administration of private justice outwith the normal course of litigation. In turn this should illuminate Dr. Wormald's suggestion that 'the demarcation between state or government on the one side and kindred or bloodfeud on the other may be too rigid'.¹³

In this chapter it is hoped to demonstrate that legal action before the courts was an important means of resolving dispute which was often used alongside other means before a final settlement was reached, and that the lords of council and session, as well as administering the common law were also frequently approached using the modes of private justice, particularly when parties wished to submit to arbitration.

¹²Ibid.

¹³'Bloodfeud, Kindred and Government', p.56.

Arbitration and litigation in England

A second purpose of this chapter is to assess the extent to which the relationship between litigation and arbitration in Scotland was similar to that in England. In relation to fifteenth-century England, Dr. Edward Powell has made a study of this question and has advanced a thesis in this respect. His starting point is the recognition that 'in the late middle ages the vast majority of lawsuits were not terminated by a court judgement', and that 'between self-help and resort to law lay a variety of methods for extra-judicial compromise'.¹⁴ However, he dismisses the argument that resort to such methods was forced on litigants by the ineffectiveness of the legal system. Although procedures such as arbitration had distinct advantages when it came to achieving a settlement, Powell comments that 'perhaps the most striking feature of arbitration in late-medieval England is the frequency with which it occurs in conjunction with litigation'.¹⁵ In other words, in particular disputes it was extremely common to find that legal process was being undertaken at some point whilst arbitration or some form of mediation might be the eventual method by which a settlement was reached. Legal action could play a tactical role, for example, in pressurising an opponent to negotiate and reach a compromise. Powell also points to the way in which arbitrated settlements were often given the force of a court decree through the completion of a collusive legal action. It is therefore very difficult to categorise arbitration and litigation in early fifteenth-century England as simply two alternative systems for resolving dispute. They were alternatives, but were complementary and tended to be used in tandem. It follows from Powell's argument that society was not necessarily predisposed to one method or another. Rather, individuals in dispute drew on a variety of methods to come to settlement, and what

¹⁴E. Powell, 'Arbitration and the Law in England in the Later Middle Ages', *Transactions of the Royal Historical Society*, xxxiii (1983), p.51.

¹⁵*Ibid.*, p.57.

is clear above all is that court proceedings and appeals to royal authority and process of law remained central to such an endeavour in fifteenth-century England.

This point is substantiated in the contrast which Powell draws between the manner in which the the common-law courts 'were not actively engaged' in the promotion of arbitration,¹⁶ and the way in which the court of chancery was 'more immediately involved in fostering arbitration',¹⁷ since its early growth was in part based upon the hearing of petitions arising from arbitration.¹⁸ In particular, the chancellor was active in arranging and supervising arbitration to settle disputes which came before him, and sometimes acted in this capacity himself.¹⁹ Noting the evidence of magnate councils as well, Powell concludes that 'the emerging equitable jurisdictions of late-medieval England reveal the interdependence of litigation and arbitration in its most refined form. The two became part of a single process of dispute settlement, as the fluidity of equitable procedure allowed them to be used almost interchangeably'.²⁰

Powell's work prompts several questions in turn about the role of council and session in dispute settlement in the reign of James V. Is there any evidence in the council records of the interdependence of litigation and arbitration such as Powell has established in England? In particular, did the session play a similar role to chancery in arranging and undertaking arbitration? If so, what can be gleaned from this evidence of the nature of arbitration and the reasons for its deployment instead of litigation? Furthermore, how distinctive was arbitration procedure, and to what extent did the canonist distinctions between the offices and powers of arbiters,

¹⁶Ibid., p.63.

¹⁷Ibid., p.65.

¹⁸Ibid., p.64.

¹⁹Ibid., p.65.

²⁰Ibid., p.66.

arbitrators and amicable compositors appear to be observed? Finally, in sum does this evidence offer any insight into the role which the lords of council and session were perceived to play in resolving disputes by 1532, and the extent to which this had developed since the early 1500s?

Arbitration in Scotland

Dr. Wormald has emphasised the long history enjoyed by arbitration in Scotland since the thirteenth century, and that 'the procedure used in the private settlement could very well mirror that of the courts, for arbitration was common in both'.²¹ In relation to this final remark, it should be made clear that arbitration was a third method of resolving disputes, in addition to court proceedings and private settlement between the parties. Also, in procedural terms it was an alternative to litigation, and therefore is best regarded as a mode of private justice rather than the public justice administered by the courts, although, as will be demonstrated, the courts could have an important role in settlements arising from arbitration. However, it is true that arbitration could follow on both from private attempts to negotiate a settlement and from court proceedings.

Arbitration occupies a notable part of *Regiam Majestatem*, as one of the main non-Glanvillian sections, and one based on a canonist source. Professor Peter Stein identified this source as the *Summa in Titulos Decretalium* of Goffredus de Trano.²² The editing of these passages in order to reflect local practice and conditions clearly implies that arbitration was an established procedure in Scotland by the early fourteenth century. Writing of the thirteenth century, Lord Cooper remarked that

²¹'The Sandlaw Dispute', p.203.

²²P.G. Stein, 'The Source of the Romano-canonical Part of *Regiam Majestatem*', *Scottish Historical Review*, xlviii (1969), p.109.

'even in these early days there was evidently a marked demand for methods more flexible and equitable than those of the ordinary judicial tribunal, clerical or lay, and we find in a decrescendo of formality the *judex*, the *arbiter*, the *arbitrator*, and the *amicabilis compositor*'.²³ Canonist writers distinguished the functions of an arbiter and arbitrator on the basis that the former made his determination in accordance with law, and the latter in accordance with what one might call fairness, taking into account all matters in dispute between the parties.²⁴ In this scheme of things amicable compositors seem merely to have been mediators, without the power to make a determination of the dispute.

Unsurprisingly, the statements concerning arbitration made by Sir James Balfour in his *Practicks* (completed in the early 1580s) do not represent any particular advance on those contained in *Regiam Majestatem*, which in fact comprise his main source.²⁵ In the absence of any study of arbitration generally in medieval Scotland, particular note will be taken in this chapter of how the law on arbitration was applied in practice.

The role of council and session in arbitration

A certain quantity of evidence of the conduct of private arbitration is disclosed in the proceedings of council. Through the registration before council of agreements, termed 'compromits' or 'appunctments', and submissions to arbitration, it was given the role of formalising such agreements and subsequent stages of procedure following upon such agreements, even though it was not being asked to resolve the dispute itself. The lords of council were thus perceived to be the

²³T.M. Cooper, *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), p.xlix.

²⁴R.L.C. Hunter, *The Law of Arbitration in Scotland* (Edinburgh, 1987), pp. 17-21.

²⁵*The Practicks of Sir James Balfour of Pittendreich*, ed. P.G.B. McNeill (Vol.ii, Stair Society, 1963), pp. 411-17, 'Anent Arbitrie'.

appropriate body before which parties could appear to formalise both a decision to *compromit* and the subsequent steps in what was essentially a private matter under arbitration. Although the practice of registering such agreements can be seen in the earliest extant council records, from the 1470s, it would appear that the lords did not at that time necessarily interpose their authority to such agreements, as became the later practice.²⁶

An example of parties binding themselves before council to observe a *compromit* is that of Alexander Dunbar of Cumnock and Huchon Ross of Kilravock on 30th August 1529.²⁷ In this case the arbiters were Alexander Dunbar, subchantor of Moray; James Dunbar of Tarbert; Thomas Urquhart, sheriff of Cromarty; and Robert Innes of Innermarkie; with James Stewart, earl of Moray, as oversman. Although a private settlement, the parties obviously felt the need to involve the highest civil authority in the land below the king himself. The dispute was over the right to the feudal casualty of non-entry for the lands and barony of Sanquhar in the sheriffdom of Elgin and Forres. However, registration before council did not necessarily mean that the substance of the *compromit* was carried out or that the arbitration process led to settlement. In this example, over six months later and without explanation of what has passed in the meantime, the same dispute was brought before the lords on 21st March 1529/30.²⁸ This time the parties bound themselves 'to abyde by a decreet' of Gavin Dunbar, chancellor and archbishop of Glasgow, and Gavin Dunbar, bishop of Aberdeen (uncle of the archbishop).

A more complicated example can be seen on 1st April 1530, when William Scott, burgess of Montrose, made an appearance before the lords to complain against

²⁶*Acts of the Lords of Council, Vol. III, 1501-1503*, ed. A.B. Calderwood and A.L. Murray, 'Introduction' by Dr. A.L. Murray, p.xxvi.

²⁷SRO CS 5/40, f.111v.

²⁸SRO CS 5/41, f.26r.

Andrew Seton, laird of Parbroath, who had summoned William for reduction of a decret obtained by William against him.²⁹ The following day, however, the parties appeared again, and compromitted themselves to abide by the sentence of five arbiters, all lords of session.³⁰ However, it was necessary for Andrew Seton's procurator, Robert Leslie, to come before the lords again four days later to obtain a formal charge to the arbiters to proceed in the manner envisaged in the compromit. It seems that letters had been obtained from the king which contained a clause discharging the arbiters from proceeding, but that some form of misrepresentation had been behind this which had now been uncovered. The king wrote personally to the lords and the chancellor on 6th April explaining that he had been unaware of the clause of discharge and that the commission was to amicable compositors, and that the judges named in the compromit should now proceed to give their decree arbitral after all.³¹ All these steps were taken through council - the king did not charge the arbiters directly to proceed, but directed council to charge them.

Again, when the parties themselves agreed to discharge arbiters whom they had commissioned, such a step might be formalised before council. On 12th August 1529, for example, the arbiters chosen between Robert Forman, dean of Glasgow, the prior of Pittenweem and others, and the laird of Ardross, were discharged 'fra all proceeding or labouring apoun the said compromitt' in the presence of the parties and the lords of council. All of the arbiters were themselves lords of council: Alexander Mylne, abbot of Cambuskenneth; George Learmonth, prior of Pluscarden; Adam Otterburn, king's advocate; Nichol Crawford, justice clerk; James Lawson and Francis Bothwell.³²

²⁹SRO CS 5/41, f.56v.

³⁰SRO CS 5/41, f.59.

³¹SRO CS 5/41, f.70.

³²SRO CS 5/40, f.94r.

A reason why parties conducted the formalities of private settlement before council in this way is suggested by the registration on 15th March 1529/30 of an appunctment between Janet Rowat, the relict of an Edinburgh burgess, and Alison Ruche. Registration of such a deed in the books of council gave it the force of a decree. This would mean that the private agreement could then be more effectively enforced through legal process. The parties bound themselves to 'stand and undourly the sentence and decrete arbitrale of honourable personis' Adam Otterburn; James Simson, official of Lothian; John Bothwell; and James Lawson: appointed as 'jugis arbitral and amicable compositours'.³³

The status of a registered agreement is further brought out in a hearing on 4th March 1530/31, concerning David Blair of Adamton and William Hamilton of Sanquhar in a dispute over the right and title to land, at which hearing the matter was submitted to arbitration. The nature of the regard which parties must have had for registration in the books of council is shown by the provision that the decree given by the chosen amicable compositors is to be put in the 'buke of counsell' and to have the strength of a decree 'as it had bene gevin be the hale lordis of the session'.³⁴

Another reason for registration is suggested by a compromis submitted by William Hamilton of Sanquhar Lindsay in a dispute with James Wallace of Carnell and Adam Wallace of Newton, in relation to a claim to the common land of Sanquhar Lindsay in Ayrshire. Letters to command, charge, compel and distrain the parties were issued as a result of registration, and the compromis itself was 'insert' in the books of council 'for the mair securite of the fulfilling of the promiss'.³⁵ Once registered with the consent of both parties there could be no dispute about the terms

³³SRO CS 5/41, f.10.

³⁴SRO CS 5/42, f.94.

³⁵SRO CS 5/43, f.153.

of the agreement or need to verify what one or other party thought were the terms beyond reference to the council register. This in turn meant that the parties had the security of knowing that their future conduct could be tested against an objective and unimpeachable public document. Without this precaution a party who objected to a decree arbitral could attempt to renounce it, as did the earl of Crawford on 7th July 1531. He referred to a 'pretendit decret arbitrale' given between him and his son Alexander, but claimed he 'knew nevir na compromit nor decretit nor wald consent to the same and thirfor renunciit the said decretit arbitral'.³⁶

In the giving in of an appunctment on 19th February 1531/32 by Dame Isabell Campbell, countess of Cassillis, and Alexander Kennedy of Bargany, the idea that compulsion of the parties can follow from registration in the books of council is explicitly referred to. The appunctment is given in 'and baith [the parties are] to be compellit to fulfill thair part of the same'.³⁷ The sanctions for not fulfilling a court decree were far more severe than the civil remedies available for breach of an agreement, since they could amount to being declared rebel and put to the horn and thereby excluded from the king's peace. This was explicitly recognised in some appunctments. For example, on 27th February 1531/32, Hew, Lord Lovat, and George Richardson, son and executor of the late Robert Richardson, a burghess of Edinburgh, asked that their appunctment be inserted into the books of council to have the strength of an act and decree, with letters to command and charge the parties to fulfil its terms, under pain of being declared rebel and put to the horn. Their dispute centred on payment of £43 for silk cloth and other merchandise, and the appunctment laid down structured repayments. It is hard to know just how much effect being put to the horn might have had in a case like this, but nevertheless it was technically a severe sanction.

³⁶SRO CS 5/42, f.195r.

³⁷SRO CS 5/43, f.162.

Another advantage of registration of the decree arbitral itself was that it could then be transferred like a normal court decree to the successors in title of the original parties in dispute, to whom the rights under the decree would thereby be assigned. On 25th June 1532, a decree arbitral which had been 'insert' in the books of council on 12th April 1527 was transferred to Gilbert Kennedy, third earl of Cassillis, and Helen Crawford. Helen was the relict of Thomas Corry of Kelwood, who had been awarded £300 against the second earl of Cassillis, who had been assassinated in 1527.³⁸

A distinguishing feature of arbitration was that it could encompass not just a particular dispute, but all outstanding matters of dispute between two parties. For example, under a compromit between themselves on 31st March 1530, Lord Hay of Yester and George Hay submitted themselves to Gavin Dunbar, bishop of Aberdeen, George, coadjutor of Aberdeen, and James Hay, bishop of Ross, in 'all materis, questions, cravinges and pleyis that any of thame has againis utheris any maner of way and be quhatsumevir caus'.³⁹ In this instance no particular matter of dispute is identified within the 'all materis' clause. In the compromit already mentioned between Huchon Ross and Alexander Dunbar the scope of the dispute had been at three levels: first 'anent the nonentres of the land and barony of Sanquhar'; secondly 'all utheris rytis that ay of thame can ask, has had or may haif to the saidis landis'; and thirdly 'all utheris materis debatable betwix thaim'.⁴⁰

³⁸SRO CS 6/1, f.40r.

³⁹SRO CS 5/41, f.52.

⁴⁰SRO CS 5/40, f.111v.

Arbitration and litigation

Sometimes parties approached council for the first time with a *compromit* already agreed, but it was also common for a dispute to have already come before council under summons, prior to a submission to arbitration being made, and the litigation thereby abandoned. For example, on 19th June 1533 Sir John Stirling of Keir and James Kinross bound themselves to arbitration in relation to matters contained in a decree of recognition 'as in ane summond for retreting of the said decrete of recognition' raised by Kinross.⁴¹ Similarly, the *appunctment* already mentioned between Janet Rowat and Alison Ruche followed the raising of a summons by Alison Ruche and her husband John Mair.

Arbitration could follow after protracted legal process. For example, on 10th November 1531 the lords received a supplication from Sir David Bruce of Clackmannan against his spouse Janet Blackadder. Janet had apparently obtained a sentence or judgement before the official of St. Andrews against him, under which he had had to make her payment and infeft her in certain lands. David appealed, but Janet took out letters of apprising against his lands and goods, alleging that he had been under cursing for forty days. She took out letters to *poind* and *distrain* him as well. At this hearing on 10th November, the parties agreed to the arbitration of the chancellor, the comptroller, and the prior of Pittenweem. In the meantime the action was continued to the 4th December, and 'all letters, process and proceeding' were to cease.⁴²

In a supplication of Alexander, prior of Pluscarden, we find a dispute resolved in an *appunctment*, but which is followed by litigation over the fulfilling of

⁴¹SRO CS 6/3, f.24v.

⁴²SRO CS 5/43, f.68v.

that appunctment. William Wood of Bonnington and Arthur Panton, the other parties, had alleged that the prior would not fulfill the contract and appunctment he had entered into, and obtained letters charging him to fulfill his obligations. The prior raised a summons on them to produce these letters. However the 'term peremptour' having arrived, Panton produced a compromis providing for arbitration, and the council therefore 'supersedes' the legal action until the third day of the next session.⁴³

On 30th April 1534 John Dickson of Ormiston tried to get William Dickson to fulfil a decree arbitral and hand over his charters to some disputed land. It is mentioned that 'eftir lang pley movit betwix thaim anent the landis of Ormiston...thai compromittit the same'.⁴⁴ Again, this shows settlement through arbitration arising after a long period of litigation.

Such agreements did not necessarily hold, though, and they could be superseded by a further agreement, as was apparently the case with Alexander Dunbar and Huchon Ross in the instance already cited. In proceedings on 29th January 1531/32 William Cockburn, as brother of the late John Cockburn of Newhall, gave in an agreement to be registered before council concerning the redemption of lands under a reversion, and which is explicitly said to supersede a previous agreement.⁴⁵

In other cases, agreements were superseded by formal litigation. For example, on 17th June 1533 James Charteris came before council by way of supplication. His complaint was that he had previously had Alexander Kirkpatrick

⁴³SRO CS 6/1, f.93.

⁴⁴SRO CS 6/4, f.115v.

⁴⁵SRO CS 5/43, f.141.

of Kirkmichael under summons before the lords of council for the profits arising from peaceable occupation of lands which Alexander had denied to James.⁴⁶ However, that summons had been continued to 26th January 1530, after calling on 12th December.⁴⁷ Incidentally, as was quite typical James Charteris had raised his civil action after Kirkpatrick had been indicted in the justice ayre of Dumfries, with Lord Maxwell having stood as his pledge and surety. When compearing in June 1533, Charteris explained that the previous summons had not been pursued, and he and Kirkpatrick had 'compromitted' and submitted their dispute to arbiters. However, the arbitration had apparently never happened, since it is stated that the compromit is 'fundin by the lordis of nane availe and expirit in the self'. James was now appearing to reinstate his summons so that he could call witnesses and the lords may 'proceid and do justice in the said mater'.⁴⁸ The lords then authorised letters to be issued summoning Alexander to compear on 8th July 'to answer in the said matter eftir the form of the last act of continuation', which was over two years earlier.⁴⁹ Kirkpatrick had not compeared at this hearing, but was personally present at the next one, which was on 12th July, and the matter now proceeded as a normal action under summons.⁵⁰

Sometimes a party raised an action before council by summons when it appeared to have been settled already by some form of arbitration or mediation. For example, on 23rd July 1533, John Hepburn, the parson of Hawick, summoned Walter Scott of Branhholm for spuilzie of the teinds and profits of his benefice, parsonage and vicarage of the kirk of Hawick in 1530, and the occupation of his kirklands.⁵¹ However, Scott compeared personally and alleged that he and Hepburn

⁴⁶SRO CS 6/2, f.188v.

⁴⁷SRO CS 5/41, f.145v.

⁴⁸SRO CS 6/2, f.188v.

⁴⁹Ibid.

⁵⁰SRO CS 6/3, f.15.

⁵¹SRO CS 6/3, f.38.

had 'compromittit thaim...anent frutis' and that the friar to whom they had submitted the dispute had accepted the commisssion and already given his sentence. In any event, Scott submitted, the matters contained in Hepburn's summons were already the subject of an action in the commissary court of Glasgow, from which Scott had appealed to Rome. Hepburn's summons was put to one side and and Scott ordered to prove his allegations. The next hearing was not until 10th November 1533 in the event, at which point Walter Scott abandoned his exception, and chose instead to refer the whole matter to proof by the oath of Hepburn.⁵² On the same day a supplication was heard from Scott, in which he complained that he had now been put to the horn by Hepburn, again alleging that he was thereby wronged because of the existence of an appunctment between them which had been ratified by Hepburn. Hepburn denied this and the matter was continued for him to 'liquidate' the sum sued for. On 21st November 1533 the lords gave decree against Walter Scott. If there had been a compromit Walter failed to produce it. The case does illustrate, however, the variety and interaction of remedies, formal and informal, which parties in dispute could make use of.

In another case in 1529, it was alleged that a dispute under summons had already been resolved formally by a decree arbitral. Elizabeth Hamilton and her spouse James Dundas had raised a summons against Elizabeth's son James Stewart of Craigiehall.⁵³ At the calling of Elizabeth's summons James had pleaded an exception and shown that there was a decree arbitral given between him and his mother already, which decree was now to be produced in evidence. On 15th May, the following day, James Stewart stated that since the raising of the summons against him, he had compromitted with his mother, and that a decree arbitral had been given assolizing him from the allegation of spuilzie, and thus decree should not

⁵²SRO CS 6/3, f.73.

⁵³SRO CS 5/40, f.33v.

be pronounced against him. This example shows how different methods of resolving disputes interacted, but also how a resolution achieved by one method did not necessarily mean that a dissatisfied party was not going to attempt to overturn it by another.

Such a re-opening of a dispute could occur many years after its apparent resolution. At the end of 1530, for example, we find decree being given against Neil Montgomery, son of the earl of Eglinton, in favour of Marion Ross, relict and executor of Edward Cunningham of Auchinhervy, which re-opened a matter he claimed had been settled by a decree arbitral seven years earlier.⁵⁴ Decree was given on 5th February 1530/31 and Neil found liable for payment of 800 merks for what had apparently been a violent raid on the home of Edward. Neil had been indicted for the offence in the justice ayre of Ayr on 17th January 1529. However, two days later Neil's brother, Robert Montgomery, bishop of Argyll, appeared on Neil's behalf to allege that the complaint upon which Marion's action had been founded had been addressed in a decree arbitral between the earl of Eglinton and Lord Kilmaurs.⁵⁵ On 28th February, Neil compeared himself by way of supplication, explaining that the damage for which the action had been brought had already been assythed and made the subject of a compromit between the earls of Glencairn and Eglinton and their kin (it is unclear whether this might be the same settlement as the one in the compromit mentioned by the bishop of Argyll). Neil went on to say that a decree arbitral had been given on 13th March 1523 in Edinburgh, and produced an acquittance from the late Edward Cunningham granting that he had been fully assythed by the earl of Glencairn on Neil's behalf. The pronouncement of the decree against Neil was

⁵⁴SRO CS 5/42, f.78.

⁵⁵SRO CS 5/42, f.65v.

suspended, but the action continued since Marion's husband compeared for her and alleged that the acquittance in question was false.⁵⁶

Sometimes formal legal action was merely suspended to make way for negotiation and the possibility of a private settlement, but on the explicit understanding that if such a settlement was not reached within a certain period of time then legal process would be resumed. This is illustrated at one point in the protracted dispute of many years duration, between Lord Fleming and John Tweedie of Drumelzier. On 26th January 1530/31 John Tweedie appeared in order to ask instruments that whilst the lords of council had continued his summons against Lord Fleming until the coming Tuesday, 'in hope of concord', nevertheless if no agreement was reached between them then without further delay the lords should proceed on the summons and minister justice.⁵⁷ By 31st January both parties were prepared to submit their dispute to the lords of council as amicable compositors, apparently after the personal intervention of the king.⁵⁸ Similarly on 30th July 1532, Alexander, prior of Pluscarden, appeared in order to answer an accusation that he refused to fulfil a contract and appunctment between himself and William Wood of Bonnington and Arthur Panton concerning intromission with escheat goods, and to see Panton prove the allegations against him or grant him an absolutor. However, at this point Arthur produced a compromit which bound the parties to accept the verdict of certain arbiters. The lords of council 'superseded' the action until the third day of the next session, so that in the interim the arbiters could give their sentence.

A situation could also arise in which it would appear that a court decree had by consent of the parties been superseded by an arbitrated settlement, but that one

⁵⁶SRO CS 5/42, f.78.

⁵⁷SRO CS 5/42, f.8.

⁵⁸SRO CS 5/42, f.24.

side then went back to try to enforce the court decree. This scenario is apparent on 21st March 1533/34 when John Steel of Kilmaurs and John Boyd compeared. Boyd had called Steel before the sheriff of Ayr and been awarded the sum of five merks, but thereafter both parties referred the matter to arbiters who proceeded to give decree arbitral. However, Boyd then obtained letters charging the sheriff to put the court decree to execution and to ensure that Steel made payment, but omitting any reference to the decree arbitral. Steel then found himself poynded for the sum in question. Upon his protest, the lords decided that he should be allowed to prove that the reference to arbiters had been made, and ordained him to summon the arbiters and the witness and notary mentioned in the decree. The notary was ordained to produce his protocol book. The dispute over whether there had been an arbitrated settlement was going to have to be laboriously proven.⁵⁹

The ramifications of settling a dispute between two powerful figures could be notable, and a decree arbitral could encompass relations between such figures and a wide variety of their friends and servants. On 9th March 1533/34, for example, John Somerville of Cambusnethane complained to the council that Patrick Mure of Arniston had raised an action of lawburrows against him when this contravened a decree arbitral already given involving Sir James Hamilton, of whom he was 'man and servand'.⁶⁰

Sometimes it is apparent that the lords of council have themselves chosen arbiters to hear a dispute between parties. On 23rd October 1531 a supplication was heard from Adam Wright and Edward Thomson against William Buchan. The complaint was that Buchan had not fulfilled the terms of a decree arbitral, but it is

⁵⁹SRO CS 6/4, f.100v.

⁶⁰SRO CS 6/4, f.46.

narrated that the arbiters, the bishop of Ross and the provost of Edinburgh, were 'juges arbitratours chosen be the lordis of counsal betwix the said personnis'.⁶¹

In fact, there are many examples of parties to arbitration coming before council seeking orders to compel the other party to fulfil a decree arbitral. For example, on 31st July 1529 James Kennedy compeared as procurator for Gilbert Kennedy of Kirkmichael and produced letters which had been served on Gilbert charging him to fulfil a decree arbitral or to compear and show a reasonable cause why he should not do so. In this case, the procurator protested successfully that Gilbert should not have to answer in this matter until he was served with a new summons on twenty-one days' notice by Janet Dunbar and her spouse Gilbert Boyd.⁶²

A more extended dispute over the fulfilling of a decree arbitral is described in an action between Archibald Fairlie, fiar of Braid, and Robert Bruce, burgess of Edinburgh, in February 1531/32. Archibald appeared before council by supplication to complain that a decree arbitral had been given between him and Robert which Robert 'postponis and deferres to fulfill', even though 'eftir he was requirit thirto he promittit to fulfill the samyn' as could be seen in an instrument produced by Archibald. Robert had now been charged to compear 'to heir him decernt to fulfill the said decrete arbitrale for his part or ellis to shaw ane resonable caus quhy he suld nocht do the sammyn'. Robert was simply charged again to fulfil the decree, since he failed to compear.⁶³ Both parties compeared on 2nd May 1532, with Robert alleging that he had fulfilled the decree in all points.⁶⁴ The lords were now being called upon to determine whether the decree arbitral had been fulfilled or not. Robert alleged that Archibald had 'by sinister and wrang information' procured

⁶¹SRO CS 5/43, f.59.

⁶²SRO CS 5/40, f.79.

⁶³SRO CS 5/43, f.166.

⁶⁴SRO CS 5/43, f.185v.

letters of cursing against him, and was to put him to the horn 'bot lauchful caus'. The lords continued the action for two days for Robert to prove that he had fulfilled the decree. The parties compeared again that day, and after seeing a reversion and letter of assignation 'uncancellat' of six acres of the land of Braid, and various other documents produced by Robert, the lords suspended Archibald's letters and declared Robert to have fulfilled the decree arbitral.⁶⁵

This example serves to reinforce the point that just because parties sought a resolution of their dispute through arbitration did not mean that legal process was of no further use. In fact, royal letters and charges were often obtained to help enforce the fulfilling of a private settlement. This is amply illustrated by the dispute between John Inglis of Kilmany and William Lindsay of Preston. John came before the council on 7th May 1532 to complain that the lords had granted letters to William which charged John to fulfil a decree arbitral between them. John, however, had appealed to the lords of council against this decree and has summoned William to compear and produce the letters he has been granted. The lords are told now that 'the said Johne standand in hope of concord divers dais the said William hes this secund day of May instant opteint ane decret as the said Johne is informit to put the said letters to execution and intends thirby to put the said Johne to the horne'.⁶⁶ These letters are now reduced as 'unordourlie procedit'. Four days later both parties compear again, and John protests that he has been charged to fulfil the decree arbitral but is ready to explain why he should not.⁶⁷ The next appearance of the parties is on 5th June and the lords are moved to declare explicitly the nature of their authority over the arbitration. They state in a sentence interlocutor that 'thai ar competent juges to understand quhether letters suld be gevin apoun ane decret

⁶⁵SRO CS 5/43, f.188v.

⁶⁶SRO CS 5/43, f.191.

⁶⁷SRO CS 5/43, f.195.

arbitrale...becaus the compromitt quharupoune the decret is gevin is actit in the bukes of counsale havand the strength of ane decret of the lordis to the quhilk thai ar competent jugis'.⁶⁸ John Inglis had tried to claim otherwise in an appeal by way of 'instrument of reclamationne'. The lords go on to find that John has failed to fulfil the decree arbitral, which awarded the 'rycht' of the teind sheaves and fruits of the parsonage and vicarage of St. Michael's kirk of Tarvit to William, and letters to command and charge him to do so are issued. William also now had royal letters to make himself be 'answerit' of the teinds and fruits.

However, the matter came up again on 18th June, with William claiming that John had 'maid him to interpone ane further reclamation fra the said decreete arbitrale out of dew time' and that in consequence he has summoned William before the official of St. Andrews for reduction of the decree arbitral.⁶⁹ William, though, submits that the official is not a competent judge in this instance, and that the official has been charged to send a copy of the 'appellacion and reclamacion' to the lords on 4th July. The lords declare themselves again to be the competent judges and ordain letters to be directed to the official of St. Andrews requiring him to cease further process in the matter. John is told in no uncertain terms that any grievance which he has in this matter is to be brought before the lords of council. The case illustrates how even though the substantive resolution of a dispute might be removed from court and entrusted to arbiters, nevertheless parties still looked to use the full panoply of the law to enforce the eventual decision of the arbiters, or equally to obstruct its implementation.

An appeal to the court of the official could be competent in other circumstances. For example, on 27th March 1533, Margaret Dalgleish complained

⁶⁸SRO CS 6/1, f.16r.

⁶⁹SRO CS 6/1, f.28v.

against her son Hercules Guthrie that he had not fulfilled a decree arbitral between them, despite being charged to do so or else to compear before the lords. On this occasion, though, Hercules was assoilzied, because he had reclaimed against the decree arbitral to the official of St. Andrews, as a testimonial under the seal of the official confirmed.⁷⁰ This would be in relation to a compromis which the parties had not registered in the books of council.

Clearly, a further difficulty could arise in respect of a decree arbitral apart from merely enforcing it. This would be the question of interpreting how it was to be fulfilled, if this was on the face of it ambiguous or if the circumstances which the arbiters had taken into account had changed. The authority of the arbiters would depend on the terms of their commissions, and these would contain a strict time limit. Normally, once they had delivered their decree they would cease to have any involvement in the dispute or in the enforcement of the decree. This was another reason why parties who had opted for private arbitration would still look to the machinery of legal process and the law courts to enforce, interpret and modify decrees arbitral. An example of this latter situation arose on 15th July 1531, when John Tweedie of Drumelzier came before the lords of council, who collectively had been the arbiters in this instance. He and Lord Fleming were personally present to see the decree arbitral interpreted in respect of certain points they had raised, and for the lords to make a declarator to this end. One of the main points was that under the decree John Tweedie was to ensure the removal of all the persons who were at the slaughter of John, Lord Fleming (the cause of the Fleming/Tweedie feud) from Scotland and England, but Tweedie was unable to fulfil this because some of these persons had now become 'men' of Malcolm, Lord Fleming. The lords assoilzied Tweedie from this point of the decree, thus formalising the position and allowing

⁷⁰SRO CS 6/2, f.140.

Tweedie to say that he had fulfilled the decree in all points. Both parties wished for such a formal declaration and it was the lords of council who were best placed to give it. Lord Fleming stated that 'gif the lordis findis ony poyntis unfulfillit he sall fulfill the same', so that 'na process suld be led apoun him in tyme tocum'.⁷¹ It was also important for each side to accept that the other had fulfilled all points of the settlement and to this end Lord Fleming also asked instruments to record the fact that Tweedie 'grantit that the said lord tuk him be the hand befor the kingis grace and chancellor and for that part had fulfillit the said decret in that punct'.⁷²

It was not always the case that a compromis contained exhaustive conditions as to how an arbitration was to proceed. On occasion parties might register a compromis but then look to the lords to determine further procedure. For example, on 10th May 1531, Alexander Scrimgeour and his wife compromitted with Oliver Maxton and his spouse in relation to actions of spuilzie and reduction of process between them. They registered their compromis, which named eleven arbiters but stated that any five of the eleven could hear the cause.⁷³ However, the record then states that the lords of council assigned to the arbiters a particular day to 'accept and tak the said compromis and mater in and apoun thaim', and also ordained the parties to compeir before the arbiters in Edinburgh on the same day to 'persew thair actionis sa that iustice may be ministrat'.⁷⁴ It is illuminating that the language and formality of litigation is carried over into the realm of arbitration in this way.

The interaction between different courses of resolving dispute, and the important role council and session could have even in private arbitrations, is shown vividly in a dispute between the prior of Pittenweem; William Dishington, fiar of

⁷¹SRO CS 5/43, f.8v.

⁷²SRO CS 5/43, f.8r.

⁷³SRO CS 5/42, f.180v.

⁷⁴SRO CS 5/42, f.181.

Ardross; and Thomas Scott of Petgormo in 1533. The parties had 'compromitted' and referred their dispute to arbitrators, but the prior came before council on 10th March 1533/34 to explain that although the matter had been so referred, 'the saidis arbitratoris thinkis the mater difficult to thaim' and so in a new compromit of 21st January 1533 the parties had referred the matter to the lords of council instead and assoilzied the arbitrators from the previous compromit. Clearly, whatever the difficulty, there was either greater authority, objectivity or expertise in the lords of council than in the original arbitrators.⁷⁵ A further element in the resolution of this dispute was the personal involvement of the king, who had written to the chancellor, president of the session and lords of session on 27th February from Cupar, where he was at the time. The letter is copied into the council register, and in it the king asks the lords to 'accept the samin apon you' and to 'end the samin to the eis of all partiis that thai may leif in frendschip, doand na wrang to owther of thaim'. He states that 'we pray you to do as ye will do us singular emblesour, becaus all the saidis partiis hes requestit us to this effect'.⁷⁶ There also seems to be some element of delay on one side or other, since the prior declares himself 'redy to obey and fulfill the compromit' whereas he makes a point of stating that 'it stud nocht in him the nonfulfilling of the said compromit nor writing [of the king] forsaid bot in the said William Dischington alanerly'.⁷⁷ So in sum we see here the involvement of chosen arbitrators, the council, and also the separate personal petitioning of the king, with the final outcome being that the lords of council are to sit as arbitrators in the dispute. The fact that accepting the office of arbitrator was a voluntary matter may explain why the king merely asked the lords to accept the commission rather than commanding them to do justice as he might have done if the action was proceeding by royal summons.

⁷⁵SRO CS 6/4, f.53r.

⁷⁶SRO CS 6/4, f.53v.

⁷⁷SRO CS 6/4, f.53r.

Returning to the question of overturning the decision of arbiters on a particular matter, it seems that the council did exercise a kind of supervisory jurisdiction and would reduce a decree arbitral if, for example, evidence upon which the arbiters based their decision proved to be false. For example, on 28th May 1533, Huchon Dunning appeared before the council to pursue a summons against John Scott, alleging that John was troubling him in the enjoyment of lands he held under lease after the two of them had compromised in a dispute over the lands. The land had apparently been alienated to Scott after the assedation had already been given.⁷⁸ The arbiters had decreed that since the assedation preceded the alienation and had four years to run then Huchon should continue to possess the lands, although he should also pay mails and duties to John Scott. However, Scott alleged that 'the said pretendit decret arbitrale wes of na effect nor valour and the lordis aucht nocht to compell him to fulfill the same becaus it wes gevin eftir the form and tenor of ane pretendit letter of assedation... quhilk was fals and fenzeit in the self, maid with ane antedait efter that he had analyt the said lands to said Jhone'.⁷⁹ The lords then assigned John a court day to prove his allegation, and made it clear to the parties that 'meyntime...na innovation be maid thirin quhill it be understand and decydit be the saidis lordis quhilk of the saidis partyis hes ryt to the saidis takkis'.⁸⁰ The action was continued to 20th June but it was in fact the 25th June before it came up again. The lords reduced the decree arbitral because the assedation was false.⁸¹ Notably, Huchon had refused to produce the letter of tack which he was relying upon, advancing the weak excuse that he would not produce it since John Scott's procurator 'impugnit the same'.⁸² The lords here appear to be exercising their general jurisdiction to decide upon conflicting claims to land, but this case shows how that

⁷⁸SRO CS 6/2, f.180r.

⁷⁹SRO CS 6/2, f.180v.

⁸⁰Ibid.

⁸¹SRO CS 6/2, f.206.

⁸²SRO CS 6/2, f.203.

jurisdiction was not to be excluded by submission to arbitration if it could be proved that there was a flaw in those arbitration proceedings.

In another case on 31st March 1531, a decree arbitral was challenged because it had allegedly been given 'outwith the day expunt in the compromitt'.⁸³ Christine Gray and her son James Abernethy were pursuing an action against the arbiters in a decision over the ownership of a gable wall between two properties in the Canongate. The decision of the arbiters is overturned, but somewhat unexpectedly the lords do not explicitly reduce the decree in the manner craved by the pursuer, but simply give decree anew as judges and amicable compositors with the advice of the principal masons and wrights of Edinburgh, aiming at 'the mair eisiamente of baith the partiis'.⁸⁴ It is not immediately clear whether acting in this capacity presupposed arbitration or litigation, and whether it was a decree of the lords of council or a decree arbitral which was pronounced. There is no mention of the matter being submitted to the lords as arbiters. However, it does show a dissatisfied party to an arbitration coming before council to have a decree arbitral reduced or superseded by virtue of a technical flaw.

Simple submissions and mediation

The examples cited so far have related almost exclusively to disputes which parties have submitted to the decision of arbiters through a compromis. However, other examples in the council register illustrate the reference of disputes to the discretion of an individual, as well as the resolution of a dispute through individuals acting as mediators rather than arbiters.

⁸³SRO CS 5/42, f.160.

⁸⁴SRO CS 5/42, f.160.

For example, on 18th March 1530/31 Mark Kerr of Dolphinton and Helen Rutherford of that Ilk bound themselves before council to 'keep the sentence and interlocutor of Walter, abbot of Glenluce tuching the perambulation of the merches betwix landis'.⁸⁵ A specific procedure was set down whereby the abbot was to visit the site of the ground in question with the abbot of Melrose as well as certain 'gentilmen of the cuntre', and with reference to charter evidence assess the correct marches of the land.

In another example, the defender in an action simply referred it to the discretion of the pursuer. Alexander Mylne, abbot of Cambuskenneth, and various tenants of the abbey were pursuing various persons for the spuilzie of goods. When their summons was called on 28th February 1531/32, however, the defenders, represented by Henry Spittal, referred the matters in the summons 'to the said venerable faderis consuence and will', after which the abbot, not the lords of council assigned the 16th March for the parties to appear in Stirling 'to heir and see him declair his will'.⁸⁶ The spuilzie had occurred over six months earlier, at the end of the preceding July, and the implication of the case might be that it was the involvement of the abbot in the pursuit of the action which led the defenders to abandon fighting the action and submit it to his judgement. After all, Mylne was one of the leading judges on the council and a man of influence at the royal court.

A further variation of the reference to an individual or party is illustrated by a dispute between William Murray of Tullibardine and Agnes Gorthy, relict of Thomas Murray of Troon, which came before council on 12th November 1530.⁸⁷ William had called Agnes before his own bailies for her to be declared to have lost

⁸⁵SRO CS 5/42, f.127.

⁸⁶SRO CS 5/43, f.174.

⁸⁷SRO CS 4/41, f.123.

or forfeited her right to a tack of the land of Troon which was his heritage. However, it is narrated that 'the said Agnes be her pur meins has optenit letters dischargeing the said William and his bailies of all preceding in the said matter quharthrow he ma nocht use his fredome and privilege of courte', for which reason he has summoned Agnes before council. However, in an apparent set-back for William the lords decern Agnes' letters to be 'ordourly procedit'. However, William then asked instruments that he was prepared to subscribe to an agreement which set up a kind of quasi-arbitration. The proposal would see Agnes 'resarvit the mater debatable betwix hir and William Murray of Tulibardin to the said William and his weil avisit counsale, the quhilke William in presens of the said lordis promittit till use the counsale of my lorde of Dunkelde, lord Ruthven, and Justice Clerk in said matter and to do na thing by uthir advise'.⁸⁸ It is not apparent whether this course was adopted by Agnes, but its formulation is suggestive of informal methods by which disputes might upon occasion be resolved.

Other examples suggest the use of mediation. For instance, the lairds of Wauchton and Niddry compeared before council on 15th November 1531. The laird of Niddry had raised a summons, but both parties now 'war contentit to use the consale of the provest of Edinburgh, the Iustice Clerk, the provost of the College [Trinity Collegiate Church], Maister Frances Bothwile, Maister James Lawson...in all materis debatable amange thaim anent the tak of West Trako'.⁸⁹ Here, though, the intention seems to have been to use this counsel by way of mediation in order to bring the parties themselves to a compromise. This is suggested by a condition which states that if the parties have not reached an appunctment by Saturday or Sunday following, then the laird of Niddry is to have process on his summons. The case is a simple but telling illustration of the dynamics of dispute resolution, in that

⁸⁸SRO CS 5/41, f.123v.

⁸⁹SRO CS 5/43, f.74v.

litigation was used to force an opponent to answer to a complaint and was then suspended whilst negotiations could be held to establish a satisfactory settlement with the help of mediators giving their counsel, but with a time limit and the threat of a resumption of formal legal process.

What looks even more like mediation is the set of arrangements agreed on 4th February 1530/31 between David Douglas of Pittendreich and John Kinnaird of that Ilk. Legal process was suspended so that the parties could compear in Aberdeen before the bishop of Aberdeen 'to the effect that my lord of Abydene may aggre the said partiis in all materis'.⁹⁰

On 9th December 1532 a case arose in which mediation was explicitly mentioned. William Lindsay of Preston raised a complaint against Thomas Trale, John Inglis of Kilmany and Sir William Inglis, apparently to block legal action in the church courts in respect of matters already agreed upon. The archdeacon of St. Andrews had granted Lindsay an assedation of lands relating to St Michael's church, Tarvit, but John Inglis had taken Lindsay to court over this. However, 'eftir lang pley thai war compromittit' and William Lindsay obtained a decree arbitral to which the lords of council then interponed their authority. It is then narrated that 'eftir all this be mediation of frendes with baith the sadis partiis consentis thai war finale aggreit lik as ane act made in the officiles buke purportes'.⁹¹ It is not made clear in precisely what manner the 'mediation of frendes' was instrumental, but clearly it had a definite role. The present dispute arose from the fact that the parson of St. Michael's had summoned William Lindsay to Rome to answer for the fruits of the parsonage.

⁹⁰SRO CS 5/42, f.30.

⁹¹SRO CS 6/2, f.26.

An example of litigation being suspended 'in hope of concord', with mediation envisaged as the means of reaching concord, is Gilbert Wauchop's action against the minister of Peebles, which came before council on 7th May 1534. With the consent of the parties, the lords of council continued the action until the following week 'so that thai may in the meyntime tak freindes and aggre thame betwix and the said day'.⁹² It is worth mentioning that the phrase 'in hope of concord' was a standard one used in any context where it was hoped that the parties to a dispute might reach a private settlement, without the sanction of a court judgement, relying upon 'love' rather than 'law' in the Clanchy sense. In a way, it seems that the objective of 'concord' is what underpins all the private methods of dispute resolution, and it may be significant that it was never used to denote the objective of litigation. This might confirm that the contrast between private methods of resolving dispute as being essentially concerned with a settlement all parties would accept, based on compromise, and public methods of vindicating rights through court decrees was explicitly recognised in the sixteenth century. In one case the objective of an arbitration is said to be 'that ane finell and gude concord may be had betwix the said partiis'.⁹³ In May 1529, Huchon Ross of Kilravock complained that the laird of Cumnock had raised a summons against him concerning a matter 'quhilk he [Ross] desyre to be ordourit amangis fryndis and nocht be the rigour of law'. Ross explained that there 'has bene greit kyndness betwix the lardis of Cumnok, him and his forbearis'.⁹⁴

Sometimes the lords of council simply continued an action for apparently the sole reason of allowing a period of time to elapse during which efforts could be made 'in hope of concord', as in the continuation of Patrick Murray of Fallowhill's

⁹²SRO CS 6/4, f.125v.

⁹³SRO CS 5/43, f.97v.

⁹⁴SRO CS 5/40, f.43.

summons against Walter Scott of Branhholm on 17th February 1531/32.⁹⁵ Sometimes the parties themselves consent to the continuation of their various actions 'under hop of concord', as in the brieves of inquest taken out for lands in the earldom of Crawford by David, earl of Crawford, and Elizabeth Lindesay in July 1532.⁹⁶ Again we find the phrase in February 1533/34 when George Roberson's procurator protested that any submissions made by him at this stage were 'intendit be na way to pley nor answer' to the summons raised against George by Agnes, countess of Bothwell, but 'was bot to persuad the party to concord'.⁹⁷

Occasionally, it is not entirely clear in what capacity a dispute was referred to the determination of named individuals. In March 1530/31, George, Lord St. John, and John Robeson bound themselves to 'abyde at the ordinance and deliverance' of the archdeacon of St. Andrews; the dean of Restalrig, William Gibson; and James Lawson, burgess of Edinburgh. They are simply designated as 'jugis' and directed to 'give furth thir sentence and mak ane fynale end therein'.⁹⁸ Again, in December 1531, Andrew Fernie of that Ilk and Elizabeth Lundy 'submittit thaim in all actions and materis betwix thaim' to the bishop of Galloway, the comptroller, and John Lethame, 'quhilk sall decyde thirin betwix and this day 8 dais', without there being any explicit indication of the capacity in which they were acting or the procedure to be used.⁹⁹ There are various possible explanations, including the failure of the record to reveal adequately the terms of such a submission, or that by the convention of the time such submissions would always be understood as relating to arbitration.

⁹⁵SRO CS 5/43, f.157v.

⁹⁶SRO CS 6/1, f.61.

⁹⁷SRO CS 6/3, f.202v.

⁹⁸SRO CS 5/42, f.135.

⁹⁹SRO CS 5/43, f.122v.

Arbitration and the lords of council as arbiters

The interaction between private and public methods of dispute settlement has been amply illustrated by examining the way in which parties to an arbitration tended to involve the courts in the conduct of their arbitrations. However, it remains to address the question why parties might prefer arbitration to litigation, and what the relative advantages were. The fact that parties themselves were well aware of the distinction is brought out pointedly when they opt for arbitration but appoint the lords of council themselves as the arbiters, even more so when the matter was already under summons before the lords.

The practice of appointing the lords of council collectively as arbiters (as opposed to named individuals) seems to be unknown in the period up to 1506, but is certainly a feature of the record by 1528. It is an open question how the practice may have developed between 1506 and 1528. What was distinctive about it was that the matter was in effect being submitted to whoever happened to be on the session of the day, and no individual names would be listed. Very often the lords would move immediately to deliver their decree arbitral. An example of such an appointment would be Hew, Lord Somerville, and John Somerville of Cambusnethane binding themselves on 1st April 1531 to 'keep the decreet and sentence of lordis of counsale namyt be the kinges grace upon the Sessioun as jugis arbitrators and amicable compositors'.¹⁰⁰ This kind of use of the lords of session may imply a perception of them by the later 1520s at least as being possessed of a more fixed, institutional and corporate identity. The comparative frequency of such collective appointment may also imply that whatever the composition of the council or session in terms of particular judges, it was generally considered to offer impartial adjudication. In this

¹⁰⁰SRO CS 5/42, f.165.

section an analysis of such cases will be made and through a detailed scrutiny of them an outline will be traced of the distinctive features of arbitration and why it may be preferred as a procedure to litigation.

If 'arbitration' is taken to be the generic term encompassing the work of arbiters, arbitrators and amicable compositors (assuming meaningful distinctions between the three were recognised), then between April 1529 and May 1534 there are thirty-two cases in the council register which involve the submission of a dispute to the lords in one or other of these capacities. There are a further thirteen general references of a decision to the deliverance of the lords with no explicit mention of the capacity in which they are to act, other than as lords of council. Two further cases involve a similar reference to the king personally.

These cases usefully illustrate two points in particular about the terms of commission of judges in arbitration proceedings. First, recognised distinctions between the offices of arbiter, arbitrator and amicable compositor are implied by the separate use of these terms in the clauses of appointment. Of the thirty-two arbitration references to the lords of council, in nine they are to sit as judges arbiters and amicable compositors; in nine as judges arbitrators and amicable compositors; in ten merely as amicable compositors; in two merely as judges arbiters; and in two as judges and amicable compositors with no reference to arbitrators or arbiters. Secondly, although these distinctions may have been recognised, it is clear that most commonly two offices were combined, as in arbiters and amicable compositors, to the extent that appointment as arbiter or arbitrator almost invariably carried with it appointment as amicable compositor. Whether there was any difference in practice in the conduct of proceedings under these various offices is, however, very difficult to say. For example, if amicable composition was merely mediation without power

of determination, it is hard to explain cases where the lords give decree as amicable compositors, an example of which will be cited later.

Distinctiveness of arbitration procedure

What made arbitration procedure distinctive, however, and why might parties prefer it to litigation? It is a feature of the record that litigation was quite often abandoned for arbitration, by a *compromit* or a submission of the dispute to the lords as arbiters, although arbitration was rarely superseded by litigation. One of the main advantages of arbitration was that it was meant to avoid the protracted duration and procedural complexities of litigation. Typically, a very short timescale was established of several weeks, within which the arbiters had to give their decision. When matters were submitted to the lords as arbiters, commonly during litigation, they would often give decree immediately at that hearing.

The stress was as much upon avoiding interminable legal process as simply reaching a speedy resolution of the dispute. There was more than one disadvantage to prolonged litigation, not least expense. A common explanation given in the record for why the parties are submitting to arbitration is 'staunching of plea'. For example, a dispute between James Douglas of Parkhead and Margaret Allan which appears in the council register in 1531 prompted Margaret to raise an action of warrandice against Gilbert Inglis at the end of 1532.¹⁰¹ At the end of July 1533 this second action was submitted to the lords as arbitrators and amicable compositors 'to geif thir finale sentence and decret betwix the saidis partiis as thai think maist expedient for staunching of pley in tymes cuming'. The lords went on to 'desertis the said sumondis for evir'.¹⁰²

¹⁰¹SRO CS 6/2, f.114.

¹⁰²SRO CS 6/3, f.58v.

Similarly in December 1532 George, earl of Rothes, and David Garden of the Newton consented that 'for staunching of lang process' the lords should be 'jugis' to decide whether certain lands were redeemable under a reversion.¹⁰³ Sometimes the lords even used the phrase when giving their decree as arbiters, as in the dispute between the earl of Menteith and Thomas Graham in 1531, when the record states that they, 'as juges arbitors for stansching of all pleis quarell and debate amangis the said partiis', give their decree.¹⁰⁴ In another dispute towards the end of 1533 between Lord Borthwick and David Hoppringle over the lordship of Stow, the matter was now said to be pending in the 'court of Rome...to the gret consummyng and spending of the substance and money of this realme'.¹⁰⁵ Indeed, at Lord Borthwick's previous appearance it had been stated that one reason for seeking concord in the dispute was 'for eschewing of truble and exhorbitant expensis'.¹⁰⁶ The king had commanded the 'convencionnis of the said partiis...that be gud mediation the saidis partiis mycht be drawn to concord', and the Hoppringles were granted a period of time to 'be avisit with frendis'.¹⁰⁷ Lord Borthwick accepted that the matter should be submitted 'in amicablewis' (sic) to be decided before the lords of council.¹⁰⁸

Occasionally, it is explicitly stated that the submission comes after long, and presumably inconclusive, argument. For example, on 23rd March 1529/30 a summons of the king and earl of Rothes against John Kinnaird of that Ilk was called, relating to the right to avail of marriage. It is stated that 'eftir lang argumente and disputatioune and productionis of documentis bath the saidis partiis referrit the said matter to be decidit be the lordis as amicable compositouris', after which the lords

¹⁰³SRO CS 6/2, f.33r.

¹⁰⁴SRO CS 5/43, f.79.

¹⁰⁵SRO CS 6/4, f.70r.

¹⁰⁶SRO CS 6/4, f.16v.

¹⁰⁷Ibid.

¹⁰⁸SRO CS 6/4, f.70r.

gave immediate decree.¹⁰⁹ Incidentally, this implies that the lords had power to determine the dispute, contrary to the general understanding of the amicable compositor outlined above. Another example is the submission of the dispute between James Bannatyne and other tenants and James Livingstone and Robert Dalziel in February 1533/34. The tenants were complaining of being forced to pay their thirl multures twice over, to each laird, and both men were charged to produce their 'right'. The record states that 'thare rytis, resonis and allegationis with the productionis of divers charteris, infestmentis and evidentis, togidder with ane decreete arbitral...eftir lang argumentis and disputatiounis, baith the saidis partiis referrit the said action for thir rytis to the lordis of counsale to be decydid be thaim in amicable wiss as jugis arbitouris and amicable compositors'.¹¹⁰ The implication is that arguments had failed to resolve the matters in dispute, or perhaps had revealed the need to prove certain points which the parties realised would prolong their dispute significantly.

These were some of the principal obstacles which could be obviated by submission to arbitration. But in what ways did arbitration have a distinctive purpose compared to litigation? What criteria did arbiters use in making their decision? Often the parties explain that it is for 'amity' that they are resorting to arbitration, and this would tend to support the thesis that private methods of dispute resolution aimed at settlement through compromise. For example, at the end of February 1531/32 Alexander Innes and Alexander Ogilvy submitted to the lords of council as arbitrators and amicable compositors 'for the mair sicker tendir life and amite to be had amangis thame in tymis cuming'.¹¹¹ In the case of Lord Lindsay of the Byres and Andrew Kinninmonth in July 1532, after the submission of the parties

¹⁰⁹SRO CS 5/41, f.32v.

¹¹⁰SRO CS 6/4, f.6v.

¹¹¹SRO CS 5/43, f.173.

to arbitration the lords of council gave sentence whilst 'willand the weile of baith the saidis partiis, kindness and friendship to stand among thaim thir kyn and friendes'.¹¹² Again, in a dispute between Isabell and Janet Inglis and their spouses and Alexander Shaw of Sauchy and the inquest which had served him to the lands of Ardmure in 1533, the matter was referred to the lords as amicable compositors, so that the lords would 'decid thirupoune in amicable wys as thai think maist profitable for the weile of baith the partiis'.¹¹³ Such language suggests strongly that the grounds upon which arbitration proceeded were distinguishable from those relevant to legal action, and close to the promotion of 'love' in the Clanchy sense. In a dispute over a coal mine between the abbot of Newbattle and James Ramsay of Cockpen in 1532 the lords gave their decree as arbiters and amicable compositors after 'beand ripelie avisit havand ee to the weile of the saidis partiis and common weile of the realme for the mynyng of colys to sustene the kingis lieges'.¹¹⁴

Broadly speaking then, arbitration enabled a settlement to be reached swiftly and to take into account the best interests of both parties. Moreover, as already noted, a reference to arbitration could encompass all outstanding matters of dispute between the parties, and thus realistically hope to establish lasting 'concord'. However, arbitration also differed in the nature of the remedy granted. It could go beyond simply providing a remedy to a wrong suffered, and could require further acts of contrition or reconciliation by the parties. For example, in a decree arbitral given by the lords as arbiters and amicable compositors between Lord Fleming and John Tweedie of Drumelzier in March 1530/31, the lords decreed that Tweedie 'sall infest ane chaplane perpetualie to sing within the kirk of Biggar to pray for the soule of umquhile Johne Lord Flemyng havand the sum of £10 yearlie of annuell to spend

¹¹²SRO CS 6/1, f.59v.

¹¹³SRO CS 6/3, f.8.

¹¹⁴SRO CS 6/1, f.105v.

and ane foundation to be maid thereof of the said Johne Twedy's heritage and lande'.¹¹⁵ Tweedie and Fleming are also to join hands in the presence of the king and the lords of council.

Another obvious advantage of arbitration was that the parties could choose the judges. Often, as in some of the cases considered earlier in this chapter, the arbiters would consist of a mixture of kinsmen and influential patrons of both parties, or on other occasions experienced men of law or lords of session who may have had little personal connection with either party. Or, as we have seen, parties seem to have come to regard the king's council, usually in its guise as the session, as itself a suitable arbiter. Upon occasion all three possibilities would be combined, as when in 1530 the prior and convent of the Dominican friars of Perth and John Ross of Craigie consented to submit their dispute to the lords of session, with the archbishop of St. Andrews, the bishop of Aberdeen and the laird of Balwerie 'being present with the saidis lordis of sessioun for that tyme'.¹¹⁶

The same example also illustrates how, when parties bound themselves to arbitration, they submitted to certain conditions which were evidently intended to fulfil the objectives of speed and finality. The two principal conditions of a technical nature in this category were that there should be no dilatory exceptions pleaded and that there should be no appeal from the deliverance of the arbiters. The Dominicans and John Ross bound themselves to 'stand at thir sentence howevir thai deliver therein bot ony dilatour exceptionis or appellationis'.¹¹⁷ Similarly, in 1529 John Johnston of that Ilk and William Hamilton of Maristoun bound themselves 'in the maist straitte forme of compromitt without reclamatioun or revocatioun', with the

¹¹⁵SRO CS 5/42, f.93.

¹¹⁶SRO CS 5/41, f.126v.

¹¹⁷SRO CS 5/42, f.126v.

lords of council to give decree as amicable compositors on a summons of error.¹¹⁸ Dilatory exceptions were pleas which advanced 'objections to the form in which an action was brought, rather than to its substance',¹¹⁹ and which could hamper the progress of litigation considerably. As for appeals, the whole point of arbitration was to bring a dispute to an end conclusively, not with a narrowly based legal decision but with a settlement capable of commanding the assent of all the parties and which they had agreed in advance to accept. After all, the defender in a court action was not required to consent to the adjudication of the court if it possessed jurisdiction, and a remedy could be granted against him whether or not he entered the proceedings. However, arbiters were by definition appointed by both parties, and a concomitant of that was the acceptance of their decision irrevocably. As we have seen, there were certainly occasions when parties would come before council again in relation to a decree arbitral, but this would normally be to question its fulfilling and not to have it overturned. However, apart from agreeing to forego formal appeal against the decision of the arbiters and dilatory exceptions, parties commonly bound themselves to promise to observe whatever sentence was pronounced. The Dominicans and John Ross did so; and in 1532 the prior of Pittenweem, Eufame Ramsay and Paul Dishington submitted to the amicable composition of the lords and 'oblist thaim to abyde at thir sentence howevir thai deist thirin'.¹²⁰ In February 1533/34 James Bannatyne, his fellow tenants, James Livingston and Robert Dalziel submitted to the arbitration of the lords and 'hes suorne to abyde at thir deliverance'.¹²¹ This condition tends to be mirrored in the giving of the decree arbitral when the lords will use words such as 'decern and deliver and for finale sentence pronuncit'.¹²² On other occasions such as the dispute

¹¹⁸SRO CS 5/40, f.22v.

¹¹⁹H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), pp. 77, 258.

¹²⁰SRO CS 6/2, f.10r.

¹²¹SRO CS 6/4, f.6v.

¹²²*Lord Lindsay v. Andrew Kinninmonth*, 9th July, 1532; SRO CS 6/1, f.59v.

over the gable wall between Christine Gray, James Abernethy and Gilbert Logan, the finality of the decision is brought out in the terms of the decree where the lords 'putte perpetuale silence to the said Cristaine and James, thair airis and assignais of all clame tuiching the said gabill and steppis of the said stair in tyme tocum'.¹²³ In another arbitration following on from an action by summons, the lords give their decree arbitral and 'desertis the said summondis for evir'.¹²⁴

Within the format which has just been outlined, there were further variations which can be found in particular submissions to arbitration. For example, sometimes specific powers were conferred on the arbiters. Hew, Lord Somerville, and John Somerville of Cambusnethane appointed the lords of council as arbitrators and amicable compositors in April 1531, specifically 'with power to the saidis lordis to prorogat the said terme of deliverance to sic uther dais as thai sall ples and think maist expedient provyding always that thai pronounce thair decret herin befor the rysing of this your sessionis'.¹²⁵

Sometimes a matter under summons could be referred to the lords as judges arbiters but only apparently for their advice and counsel, with a view to the parties then reaching 'concord' amongst themselves. Thus on 17th March 1530/31 Alexander Innes and Alexander Dunbar (dean of Moray) and the chapter of Moray 'referrit to the saidis lordis as jugis arbitours to avis with the ground rycht and poyntis of the summondis and to give thir counsale thirupoune to the dene and chapter of Murray how thai think suld be done in the said matter...and end the action be way of concord'.¹²⁶ The lords accepted this commission and deputed twelve of their number to act as 'neutrale and discrete men to consider the said summonde and

¹²³SRO CS 5/42, f.160.

¹²⁴SRO CS 6/3, f.58v.

¹²⁵SRO CS 5/42, f.165.

¹²⁶SRO CS 5/42, f.123.

merite of the caus and thereftir geve thir consale thirupoun', stating that if their counsel is not accepted then the summons will simply be continued till the third day of the next session.¹²⁷ The practice of taking the 'counsel' of the lords is also displayed in cases of litigation without an arbitration element. For example, in November 1531 Patrick Hepburn, earl of Bothwell, won an action against Andrew Kerr of Gradane, apparently for wrongous occupation of the lands of Sandestains, for which Andrew had claimed an assedation.¹²⁸ However, Andrew goes on to ask instruments that, despite having obtained his decree, the earl was 'contentit' to 'use the counsale of the lordis anent the matter'.¹²⁹

Finally, it should not be assumed that arbitration was always preferable to other courses of action open to parties. For example, on 11th July 1532 Gavin Carmichael compeared in relation to disputed lands in Uddingston in the lordship of Douglas, and it is noted in the register that 'the lordis desirit the said Gavin to submit the mater betwix him and Jane Carmichael to the lordis of counsal as juges arbitouris and amicable compositors betwix them...and thai suld dress the matter according to justice and saif the kinges honour, the quhilk the said Gavin refusit to do'.¹³⁰

Jurisdiction and arbitration

There is little evidence in the council register to suggest that arbitration was a means of circumventing jurisdictional bars on council in order to allow it to hear a matter which had initially been brought before them by summons. After all, if a defender was in a position to object to the competency of the action successfully on jurisdictional grounds, then he was hardly likely to consent to the lords determining

¹²⁷Ibid.

¹²⁸SRO CS 5/43, f.94r.

¹²⁹SRO CS 5/43, f.94v.

¹³⁰SRO CS 6/1, f.60v.

the issue as arbiters. If such a defender did so it would be more likely to be because he preferred to see the matter resolved through an arbitration rather than legal action, and enough has been said in this chapter to show why parties might have cause to hold this preference.

However, there is one case which shows how resort to arbitration could nevertheless be had when the preferred alternative of litigation was precluded for one reason or another, but the parties wished the matter to be brought before the lords in some capacity. The example in question is the action between Isabel and Janet Inglis and their spouses and Alexander Shaw of Sauchy in June and July 1533. Isabel and Janet were pursuing a summons of error against Alexander and the inquest which had served him as heir to the lands of Ardmure, but on 20th June 1533, the parties and their procurators consented to a continuation of a week so that they could compromit the question of error and the ground right of the land to the lords of council as arbiters and amicable compositors.¹³¹ However, when they compeared again on 27th June the pursuers' procurator, Robert Leslie, asked the lords to proceed upon the summons of error, but added that he was content then to 'cast in' the ground right as well. There is, however, no mention of the lords acting as arbiters. Alexander Shaw confirmed that he was also happy that the ground right should be decided 'be the lordis as jugis'.¹³² However, at this stage Shaw stated that 'gif thai found ony deficulte or doute thirin, the lordis to deceid thirupon as jugis arbitouris and amicable compositours'. However, the difficulty does not appear to relate to jurisdiction because Shaw stated that this offer was notwithstanding an 'inhibition' produced by him.

¹³¹SRO CS 6/2, f.195.

¹³²SRO CS 6/3, f.210.

This 'inhibition' was contained in a letter from the king which discharged his interest in the summons of error (which summons would always be brought in the king's name), and discharged the lords of council from proceeding upon it 'in all poyntis concerning us and for our part rasit at our instance...insafar as concerns our interest'.¹³³ Robert Leslie argued that despite this inhibition the lords 'suld and mycht proceid' at the instance of party, but the lords rejected this for the reason that 'the kingis inhibition standand'.¹³⁴

The following day, however, with the consent of both parties the lords assigned 5th July to call the summons of error and proceed upon the ground right. How this is consistent with the lords' decision of the previous day is not clear. However, they ruled that 'the summondis of erreure be first decidit and thireftir the ground ryt decidit incontinent but langar delay becaus the partiis forsaid had referrit the said matter to the saidis lordis as said is' and 'the said summondis and ground ryt be all decidit at a tyme and pronuncit togidder'.¹³⁵

Then, however, on 9th July, the parties referred 'the mater dependand betwix thame tuching the landis of Auchmure to the lordis of counsale as amicable compositors, of the quhilk the ground ryt thirof was referrit to the lordis as in the actis maid thirupon of befor'.¹³⁶ This appears to put the entire matter of error and ground right into the lords' hands as amicable compositors. If so, that was not, however, what was to transpire, at least on the face of the record. On 12th July 1533 the lords gave decree of error and reduced the retour, but after hearing the action as a normal summons. However, they did go on to decide the question of the ground

¹³³SRO CS 6/3, f.210v.

¹³⁴Ibid.

¹³⁵SRO CS 6/2, f.212.

¹³⁶SRO CS 6/3, f.8.

right (in any case beyond the scope of a summons of error) as amicable compositors, and decreed that it pertained to Shaw of Sauchy in fee and heritage for ever.¹³⁷

From the evidence in the record, it is not possible to judge conclusively why the resolution of this dispute took this form. However, it seems clear that the doubt or difficulty which was foreseen was the inhibition from hearing the original action of error which emanated from the king. Prior to mentioning this difficulty, the parties had already indicated that they were content to 'cast in' the ground right, and this is eventually precisely what they did. It would appear that despite the lords' decision that the king's letter precluded them from hearing the summons of error, in fact it did proceed as originally envisaged, and that the lords were then able to decide the ground right. However, in terms of illuminating the purposes of arbitration, it appears that it could play a tactical role in the course of litigation, where there was a reason why a summons could not proceed, or where a matter germane to the dispute needed to be decided but fell outwith the scope of the summons.

Other references to the lords of council and the king

Apart from the thirty-two instances of submission to arbitration by the lords of council between April 1529 and May 1534, there are a further fifteen general references of matters to the determination of king or council: thirteen to the lords and two specifically to the king. In these examples there is no explicit mention of arbitration as the basis upon which the submissions were made.

¹³⁷SRO CS 6/3, ff. 15, 16.

For example, on 11th May 1529 Lord Lovat, having been called in connection with a summons of error, referred all actions depending between Lord Methven, either in his own or the king's name concerning a summons of error, to the lords of council, and 'quhat thai pleis to deliver thirin owther be way of composition or uther wayis he suld stand contentit thirwith'.¹³⁸ Such a concession must have been tantamount to abandoning any defence of the action.

Matters could be submitted for decision of the lords through the procedure of supplication, which involved them exercising their normal competence rather than a specifically conferred office such as arbiter. For example, on 6th July 1531 William Cockburn of Newhall supplicated the lords in connection with a dispute over the fulfilling of a reversion agreement. The lords had previously given a decree that George Hay keep the lands until they were redeemed by payment of 550 merks before Whitsunday. William now alleged that George had received this sum from him and had already granted that the lands had been redeemed before Whitsun, but now refused to vacate them until next Whitsun. However, the record states that 'for stancheing of pley baith the partiis ar contentit that the said matter be decidit befor the lordis of counsale that it may be kenit quhilk of thame [hes] ryt tharto'.¹³⁹ George was also present and granted that he had no right or interest to the lands, whereupon the lords decerned the lands lawfully redeemed at the previous Whitsunday, discharged George from any intromitting in time to come and issued letters to this effect.

An example of a less formal reference came in November 1532, in connection with a dispute between David Beaton, abbot of Arbroath, and his uncle and predecessor as abbot, James Beaton, archbishop of St. Andrews, over the fruits

¹³⁸SRO CS 5/40, f.22r.

¹³⁹SRO CS 5/42, f.193v.

of the abbey of Arbroath. Both men were being sued by the tenants of the abbey since they were both charging the tenants to make payment of the mails, teinds and fruits of the lands and churches of the abbey.¹⁴⁰ The dispute had been a long-running one, more or less since David had become abbot in 1524.¹⁴¹ At this stage in the dispute (which was not finally resolved till the matter was decided in Rome in 1535) we find that David 'referrit him in the mater debatable betwix the Archbishop of St. Andrews and him to the lordis of counsale or any thre of thame as thai thocht expedient or quhat thai counsalit him to do conform to justice, he suld fulfill the same'.¹⁴² It is hard to assess exactly what lay behind such an offer, but it suggests a willingness to take direction from the lords of council as to how to resolve the dispute in question, as opposed to seeking their legal determination of the issue.

The reference of such matters to the lords seems to have been an established procedure which allowed complicated matters of title, in particular, to be resolved directly. For example, on 23rd November 1532 Andrew Kinninmonth of Craghall and William Lindsay of Preston 'referrit thame' to the lords of council 'anent the ryte that ilkane of thame allege to have to ane quarter of the land of Ceras now occupiit be the said William'.¹⁴³ This reference of the 'variance and debaite' between the parties came up again on 18th January 1532/33,¹⁴⁴ and proceeded to a proof as any normal action by summons.¹⁴⁵ The matter was finally disposed of after various continuations¹⁴⁶ on 21st May 1533.¹⁴⁷ The entry begins 'in action and caus persewit be Andro Kynynmonth of Craghall v. William Lindesay of Preston', before narrating

¹⁴⁰SRO CS 6/2, f.8.

¹⁴¹M.H.B. Sanderson, *Cardinal of Scotland: David Beaton, c.1494-1546* (Edinburgh, 1986), pp.21-22.

¹⁴²SRO CS 6/2, f.9r.

¹⁴³SRO CS 6/2, f.11v.

¹⁴⁴SRO CS 6/2, f.49.

¹⁴⁵SRO CS 6/2, f.49v.

¹⁴⁶SRO CS 6/2, ff.75, 119, 152.

¹⁴⁷SRO CS 6/2, f.165v.

the facts, and the complaint. Then, after recording that both parties 'referrit thaim to the lordis of consell anent the ryte that ilkane of thaim allegis to have to the saidis landis'¹⁴⁸, the details of the proof are related whereby William founded on a 'rolment' of the sheriff court of Fife which Andrew had failed to 'impreve' and prove false or invalid. Therefore the lords assoilzied William. This example shows a 'reference' to the lords as a fully integrated part of normal procedure. A similar situation occurred between the earl of Rothes and David Garden of the Newton in December 1532 in respect of a reversion of land which the earl claimed entitled him to redeem the lands of Innerleithen. For 'staunching of lang process' the parties consented that the lords of council 'be jugis and to decyde quhidder the said landis ar redeemable be virtue of the said reversion'.¹⁴⁹ This also shows a desire in litigants for speedy and flexible procedure which could be adapted to the nature of the dispute in hand.

Conclusion

Dr. Wormald's observation that 'private settlement was still...a prevalent and effective force in Scottish justice' in the sixteenth century has been strongly confirmed by the evidence surveyed in this chapter. Of course, if 'settlement' were taken to include settlement of court actions, then the statement would still be true of dispute settlement in Scotland today. However, for the sixteenth century it is clear from the way that parties sought to enhance the stability of their private settlements through the involvement of council and session that those agreements of which we have evidence in the council record must be only a small fraction of the total number which were made to resolve disputes.

¹⁴⁸Ibid.

¹⁴⁹SRO CS 6/3, f.33r.

Perhaps what is most striking about private settlements in this period is not their survival as a means of resolving disputes *per se* but that their survival did not conflict with public justice, which was developing in this period with the evolution of the session and the foundation of the college of justice, again confirming Dr. Wormald's argument. Not only was there no conflict, but private and public justice, to use Dr. Wormald's labels, seem to be at least closely inter-related. The evidence of bringing compromits before council for registration, discharge, interpretation and enforcement shows how effectively the mechanisms of public justice could be harnessed to fulfilling private settlements. Moreover, many of the insights into arbitration in fifteenth-century England to be found in the work of Dr. Powell hold true for sixteenth-century Scotland. The Scottish council records suggest that arbitration was often used in conjunction with litigation, and that a strong degree of interdependence existed between them in resolving disputes. The collusive legal actions found in England are paralleled in the registration of decrees arbitral in the books of council in Scotland. We also find the session fulfilling a very similar role to the court of chancery in fifteenth-century England, in its use to lend authority and formality to arbitration procedure, agreements and awards, of resolving disputes about arbitration, and in fostering arbitration through arranging and undertaking it in relation to those disputes brought before it. The integrated nature of private and public justice is apparent in the telling detail of the lords of council on occasion requesting a litigant to submit to arbitration. Overall, Powell's statements that 'legal action was often pursued, not as an end in itself, but as a practical preliminary or accompaniment to arbitration' and that 'the resources of the law were...harnessed to provide support and protection for arbitration' seem to hold also for Scotland.¹⁵⁰

¹⁵⁰ 'Arbitration in the Late Middle Ages', p.62.

Parties in dispute seem to have recognised the distinctive options open to them in litigation, arbitration, mediation and negotiation. However, outwith the course of litigation there was evidently still a desire to take advantage of the formality, authority and sanctions consequent upon legal process in the courts. In this sense, Dr. Wormald is also right to regard as false a distinction which contrasts 'cases which came before the courts with private settlements, seeing in the first a formality and an authoritative quality which was lacking in the second.'¹⁵¹ However, a qualification must be made to this view. It is clear that whilst parties may have reached their settlements privately, they also felt the necessity of turning to the courts in order to lend an additional degree of formality and authority to them. They wanted the most effective form of settlement, it is true, but by the early sixteenth century this did often mean involving state institutions and legal process even for the privately agreed settlement of a dispute. Thus there is reason to question Dr. Wormald's statement that 'in mid-sixteenth-century Scotland persuading parties to end their dispute was still more likely to be achieved by the pressure brought to bear by the social *mores* of the locality than by outside intervention from above, by state or central court'.¹⁵²

In fact, the evidence surveyed in this chapter suggests that it is most profitable to reject a stark contrast between different systems of dispute resolution, state and government versus kindred and bloodfeud, public versus private justice. These are abstract concepts which tend to become organised into overly exclusive and discrete categories. In practice, there was no absolute ranking of the effectiveness of different methods of resolving disputes, but simply a spectrum of methods open to parties in dispute, some or all of which might be pursued contemporaneously. If anything the most notable feature of dispute resolution by

¹⁵¹'The Sandlaw Dispute', p.192.

¹⁵²Ibid.

this time was that whichever method was used, legal process and the courts seem to have invariably become involved at some stage.

In turn, this suggests that it would be mistaken to overemphasise the character of Scottish society in the sixteenth century as a 'feuding society' if that was to imply that courts and legal process were somehow relegated to a secondary role. The feud existed alongside the law and not above it. The assertions to be found in the work of Professor Keith Brown that 'neither the law nor the judges who enforced it were ever thought of as objective and somehow above the world of the feud' and that 'judges and assizes were themselves too much of a product of a feuding society in which obligations to friends and kinsmen, and extensive corruption, made it impossible for the law to be seen as the repository of anything other than a partisan kind of justice'¹⁵³ are flatly contradicted by the evidence in and conclusions of this chapter. If he were right, it would be impossible to explain the development of the session between the 1490s and the 1540s, let alone beyond that date.

If, as Dr. Wormald suggests, the sixteenth century was the last great age of the private settlement, then one reason for this is already apparent by the early decades of the century. Even at that point it seems to have been attractive to parties to use the courts in achieving private settlements of one sort or another. The obvious inference is that state institutions such as the session were becoming recognised as effective organs of justice to the extent that a gradual process was under way by which the state and its 'public justice' was coming to be integral to the resolution of disputes at all levels of society.

¹⁵³*Bloodfeud in Scotland*, p. 44.

Chapter Five

Judicial Business of Council and Session 1529-1534

Introduction

Neilson and Paton stated in their introduction to *Acts of the Lords of Council 1496-1501* that 'the jurisdiction of the council is perhaps more significantly indicated by the few exclusions than it is either by direct grants by parliament or by the actual cases heard....It will be enough to note particularly the absence of any commission whatever for cases of crime, the exclusion of cases belonging to ecclesiastical courts, and the reservation to the judge ordinary of questions touching heritable right'.¹ They were writing with particular regard to the five-year period 1496-1501, but the only significant qualification which would have to be made in order to apply their remarks to the period 1529-34 is in relation to fee and heritage, which by that time appears to have been within the remit of the lords. In previous chapters the extent of the lords' civil jurisdiction was charted with special reference to fee and heritage, and their extra-judicial role in resolving disputes was analysed. In this chapter their general judicial business will be surveyed, illustrating in detail the 'practick' of the court. Arbitration, fee and heritage, and particularly the reduction of infeftments will be excluded from this survey so as to avoid duplication.

Academic discussion of the session in the early sixteenth century has been mainly concerned with questions of jurisdiction or institutional organisation. For

¹ *Acts of the Lords of Council 1496-1501*, ed. G. Neilson and H.M. Paton (Edinburgh, 1918) [hereafter *A.D.C.ii*], p.xlv.

this reason the judicial business of the court has not yet received the kind of detailed scrutiny which will be offered in this chapter.² It has also tended to be ignored because, for the period after 1503, such a survey is only possible by way of reference to the manuscript record. Hannay's edition of *Acts of the Lords of Council in Public Affairs 1501-1554* is a highly selective volume, but is a reliable guide at least to what he considered the administrative as opposed to the judicial business of the council. Therefore the discussion in this chapter, based on examination of the manuscript record, will also exclude the kind of public business which mainly comprises the contents of Hannay's volume. It will be restricted to describing, illustrating and analysing the business which the session transacted as a court of law. The method adopted in selecting classes of action and particular illustrations for comment is to try and give an account of every main type of action which occurred with any frequency, and to describe variations in the circumstances which underlay the raising of such actions. Attention will be given largely to the actions brought and remedies craved rather than the underlying legal rules upon which a claim depended, although occasionally some treatment of the legal rules will also be given. The result will be that a comprehensive picture of the judicial business of the session should emerge. It should be noted that in many cases a particular example could be used to illustrate a number of different aspects of the session's business, but will have been cited only in reference to one of those aspects. More generally, the body of material to be discussed in this chapter has been subdivided and treated in sections under particular headings, and these sections have themselves been classified loosely into four groups, but these subdivisions and groupings have been adopted for ease of presentation rather than to reflect any underlying jurisdictional principles. The four groups of actions have been classified as procedural actions;

²Although Dr. A.L. Murray has analysed the 'practick' of the court from 1540 in the course of his discussion of Sinclair's *Practicks*: 'Sinclair's Practicks', in *Law Making and Law Makers in British History*, ed. A. Harding (Royal Historical Society, 1980), pp.90-104.

actions under what can be characterised as the supervisory aspect of the jurisdiction exercised by the session; actions relating to property; and other substantive actions.

Some published commentary already exists on the judicial business of the session. I.H. Shearer (Lord Avonside) edited an edition of decisions of the session from 1532-33, but the volume is of limited value since it is extremely selective and frequently resorts to summary and calendar. Shearer's introduction is concise and contains barely any illustration of the record or detailed description of legal actions before the session.³ J.A. Clyde's (Lord President Clyde) introduction to the Stair Society volume covering 1501-03 contains a more detailed analysis of the business of the court, but is discursive rather than descriptive or illustrative in character.⁴ Neilson and Paton's introduction to their volume of council business contains discussion of particular matters such as the constitution of procurators⁵, warrandice claims⁶, pronunciation of sentence⁷, arbitration⁸, protestations⁹, oaths¹⁰, lawburrows¹¹, and spuilzie¹², but is more a commentary arising out of a concern with particular points than a general description. Particular points are discussed by Dr. A.L. Murray in his 'Introduction' to *Acts of the Lords of Council, Vol. III, 1501-1503*, but more with reference to the function and form of the record.¹³ In this chapter no attempt will be made to describe systematically every facet of a particular type of action, but a representative account will be given in relation to the actions which happened to

³ *Acta Dominorum Concilii et Sessionis 1532-1533*, ed. I.H. Shearer (Stair Society vol.14, 1956), introduction at pp.xiii-xxiv).

⁴ *Acta Dominorum Concilii 1501-1503*, ed. J.A. Clyde (Stair Society, 1943), pp.xiii-lx, especially pp.xxxiv-lx.

⁵ *A.D.C.* ii, p.xlvii.

⁶ *Ibid.*, p.xliii.

⁷ *Ibid.*, pp.xlix-lxiv.

⁸ *Ibid.*, pp.liv-lv.

⁹ *Ibid.*, p.lxiii.

¹⁰ *Ibid.*, pp.lxiv-lxix.

¹¹ *Ibid.*, p.lxx.

¹² *Ibid.*, p.lxxi.

¹³ *Acts of the Lords of Council, Vol. III, 1501-1503*, eds. A.B. Calderwood & A.L. Murray (Edinburgh, 1993), pp.xxv-xxviii.

arise in the period surveyed, and an assessment of the nature of the lords' jurisdiction made.

(i) Procedure and actions relating to procedure

The procedure of the court

When deciding upon the competence of a particular procedure, the lords would sometimes explicitly refer to the 'stile of court' as their guiding principle. For example, in an action of error a party to the action who had already bought land from the man who had been served heir tried to call him in warrandice, but the lords ruled that 'it is nocht the stile of court that any man may call a warand anent ane summond of error'.¹⁴ Another form of expressing this kind of procedural norm was the 'dailie use and practik' of the court. On 31st March, 1530, Alexander Ogilvy of Findlater's procurator alleged that Alexander should not have to answer a summons for reduction of a process of apprising and infeftment until the sheriff and inquest before whom the process had been led were also summoned. The argument was that 'thai suld nocht be callit according to the actis of parliament of king James the third and to the dailie use and practik'.¹⁵ However, on this occasion these submissions were rejected by the lords. In March 1530/31 an allegation that a party had not been summoned with twenty-one days' notice was said not to be 'conform to the practik and consuetude of the realm'.¹⁶ In January 1533/34 there was an allegation that the lords had proceeded 'wringiously' and 'contrar the stile practik and consuetude of court of sessioun'.¹⁷ This is, incidentally, one of the earliest uses of the expression

¹⁴SRO CS 5/40, f.43.

¹⁵SRO CS 5/41, f.54v.

¹⁶SRO CS 5/42, f.133r.

¹⁷SRO CS 6/3, f.188.

'court of session', unless the phrase is taken to be read as 'consuetude of court'...of session.¹⁸ The equation of the practick of the court with the 'consuetude' of the realm implies that these matters were considered to be settled at common law, although it was for the lords to make a determination on any particular matter what the 'consuetude' was.

It seems that the only written documents upon which legal process was initiated in the session were the summons, bill of complaint and supplication, and that thereafter proceedings were oral except for the official record in the books of council and the instruments which the parties might have drawn up recording particular matters of concern. No 'record' of written pleadings in the modern sense was created or adjusted. Even on this basis, though, the lords would occasionally order a party to make submissions in writing. For example, on 7th December 1530, in an action of spuilzie, the lords assigned a date to the pursuer to 'geif in his allegiance and exception in writt that it may be mair cleirly understand to the said lords'.¹⁹

Allegations of a failure to follow correct procedure could lead to protests from a losing party. For example, in the case of the ward and marriage of Inverugie, John Hay, who had claimed the assignation of the casualties, protested through his forspekar that the lords had 'procedit to thar sentence in the haile mater nochtwithstanding that the said M. John had divers peremptour exceptiouns quhilk war nocht yit allegit nor shewin'.²⁰ However, Adam Otterburn, the king's advocate, responded that the parties had been present before at all times and 'suld nocht be admittit to sic exceptiounis now'.²¹

¹⁸It is used again at SRO CS 6/4, f.137.

¹⁹SRO CS 5/41, f.139.

²⁰SRO CS 5/40, f.44r.

²¹SRO CS 5/40, f.44v.

One exception which could be pleaded and which related to procedure was that the defender had never been served with the summons upon which the action proceeded. This was the submission of Lord Lindsay on 1st June 1529 in connection with an action against him for tinsel or forfeiture of his office of sheriff of Fife. However, his allegation was contradicted by written proof of service: 'the summondis is indorsit that the said lord was personally summond nochtwithstanding the exceptionnis proponit for the said lord that he had nocht gottin the copy of the said summondis'.²² The lords' sentence interlocutor was also given despite Lord Lindsay's claim that he would thereby suffer prejudice, since it is stated that 'he brocht not his defencis in that mater with him and desyrat ane term thirto', that particular matter being a claim that he had been charged to enter the king's service.²³

When a party could not give evidence and with a sufficient reason, the lords could order evidence to be taken under commission. For example, on 29th July 1529 a pursuer, Marion Mowat, was considered too 'agit and feble throw infirmite' and it was accepted that she 'may nocht travale' and so the lords ordered letters in the form of a commission to be directed to the vicar general of Moray and his commissaries to 'ressaif hir aith apon the premiss and as beis deponit befor him that he send the same agane closit undir his seile to the lordis of counsale'.²⁴ This also illustrates the interaction between process in the secular and spiritual courts.

That interaction extended to the lords' continuation of a process so that a matter properly within the jurisdiction of the church courts could first be resolved there, after which the civil action would continue. For example, on 20th August 1529 William Wood of Bonnington, Arthur Panton and the king's Advocate brought

²²SRO CS 5/40, f.49.

²³Ibid.

²⁴SRO CS 5/40, f.67v.

an action against Alexander Dunbar for the moveable goods of the late Sir William Chancellor, which had fallen to the Crown as escheat upon William's death, since he 'was borne bastard and deit bastard without lauchful airis of his bodie gottin and without lauchful dispositioun maid be him of his saidis gudis in his livetyme'. The action, however, was continued for almost six months, and letters were ordained to 'be direct in the form of commission at instance of said William and Arthur to persew and mak the said bastardry to be lauchfully and sufficientlie previt befor the spirituale juge competent and mak the same to be retourit agane to the saidis lordis', so that they could thereafter minister justice on 'the punctis of the said principale summond'.²⁵ Proof could not be made of this matter in the council, even though the question of escheat was certainly within its jurisdiction. However, procedure was flexible enough to allow a retour to be made containing the findings of a church court in respect of matters pertaining to its jurisdiction.

An important respect in which process before council and session could follow and depend upon process in the church courts was the civil procedure of putting to the horn, which could follow process of cursing, or excommunication, in the church courts. Excommunication was the ultimate sanction of the church courts but had consequences in civil law by allowing civil remedies to be used. A typical illustration is found in the supplication of the parishioners of the church of Crawford Lindsay on 23rd August 1529, in which they complained that Sir Alexander Inglis had obtained royal letters 'conform to the ordinaris letters' charging them to pay to him their teinds and fruits. They had complained to the official of Glasgow, but found themselves under cursing, and now wished to be assoilzied from this and to see the ordinary's letters annulled and discharged, since they had paid their fruits. However, their approach to council was necessary because Alexander meanwhile

²⁵SRO CS 5/40, f.107v.

'intendis to put the saidis parishioners to the horn be our souveraine lordis letters of quhilkis ar past apoun the ordinaris letters now beand adnillit'. In consequence, the lords intervened to suspend Alexander's letters, and relax the parishioners from the horn insofar as they had been declared rebels. In regulating such matters, the session was the superior court to which aggrieved parties could turn for a remedy. Its role in this respect will be further examined in the section on its exercise of a supervisory jurisdiction.

Procedure of the lords of session

It is clear that the lords made their decisions by carrying out a vote amongst themselves. For example, on 13th May 1529 it is recorded that Robert Leslie 'allegit that the lordis yisterday vetit apoun the irrevalidatioun of the summondis and as he allegit gaif interlocutor that the libell was nocht relevant'. Leslie protested that the summons should no longer have process.²⁶ Very occasionally, a controversial decision will be reflected in the record by the naming of those lords who dissent. For example, on 28th April 1531 there was a summons called in the king's name against Sir David Young, chaplain, for 'the contempcioune done be him contrar our said sovereigne lord in breking of his act of parliament in the impetratioune of vicarage of Tibbermure' in Rome. Young was found guilty despite a protest by the archbishop of St. Andrews 'for himself and all the remanent of the clergy' that nothing should prejudice the privileges of the church, and that they 'apprevis nocht the act of parliament insofar as it may be any way contrar the privilege of halykirk'.²⁷ However, unusually, it is stated that 'all the lordes spirituale and temporale except

²⁶SRO CS 5/40, f.27v.

²⁷SRO CS 5/42, f.169v.

the abbot of Kinloss and dene of Dunbar declarit that Sir David Young had brokin the acte of parliament'.²⁸

Parties were attentive to the number of votes cast by the lords in making a decision, and an action to reduce a decree could found upon some ambiguity in the making of such a decision. For example, on 9th December 1532 Andrew Seton of Parbroath brought an action for reduction of the decree against him which had been made in favour of William Scott, a burgess of Montrose. Five grounds of reduction were given in the summons, the second being that 'the decreet assolzeis the said William fra the 4th reson of the said summonds simpliciter, howbeit ane grete part of the saidis lordis admittit the said reson and the remanent deliverit nocht simpliciter and determlie thirupon bot commonalie gif it wes the practik alanerlie quhairthrow the said Andro and hes procuratores protestit for nullite of the said decret'.²⁹ Although Seton was unsuccessful in getting the decree reduced, the illustration serves to reveal something of the openness of the deliberations of the lords in deciding a case before them.

There are sometimes references to deliverances which have been 'privatlie gottin', although how they were procured and from whom is not usually made clear. Such a deliverance could be overturned, however. On 23rd July 1529 Agnes Lindsay, daughter and heir to Alan Lindsay, himself son and heir to Gilbert Lindsay of Glenmure, compeared to complain that a summons she had for reduction of an infestment was privileged and could be called outwith the terms of the session. However, the other parties had 'privatlie gottin ane deliverance ordynand the said

²⁸Ibid.

²⁹SRO CS 6/2, f.25.

summondis nocht to be callit bot in the sessioun contrar the tenor of the said summondis'. The parties are ordered to compear notwithstanding this 'deliverance'.³⁰

The same problem is more amply illustrated in a case on 2nd May 1531, which also illustrates reference to the custom of the court. Margaret Allan and her spouse had obtained a decree against James Douglas of Parkhead for intromitting with mails due to her. All sorts of obstruction had been attempted to prevent her from enforcing her decree, including procrastination by the sheriff, and unsuccessful attempts by Douglas to solicit the intervention of the king on his side. We are told, however, that 'his hienes havand sa greit consideration of hir lang truble and daly vixation be the space of ten yeris bipast with the mair wald do na thing to him therein bot would that justice equalie procedit'.³¹ Nevertheless, James has succeeded in obtaining decree from the lords of council suspending Margaret's decree, and she complains that it is 'nocht conforme to daily practik consuetude and use of court, that the execution of ane decreet dulle gevin suld be suspendit be ane private selistit bill the party nevir being callit'.³² The lords go on to uphold this complaint and suspend the letters.

It is apparent from the record that once the lords gave their decision in a matter there still had to be a formal pronunciation of the decree for it to have legal force. This requirement of public pronunciation of a sentence was discussed by Neilson and Paton, although more with reference to the history of other countries than directly to Scottish evidence.³³ In respect of the record between 1529 and 1534, occasionally a party would request that the pronunciation of a decree be suspended for a short period of time. For example, Robert Galbraith asked instruments on 27th

³⁰SRO CS 5/40, f.66.

³¹SRO CS 5/42, f.174v.

³²Ibid.

³³*A.D.C.*ii, pp.xlix-lxiv.

January 1530/31 that the king's advocate consented to the suspension of the pronunciation of a decree given against the master and earl of Crawford concerning non-entries. The reason for the twenty-day suspension was 'gif instrument of seising war schawn of the land contenit in the sumonds' then the decree would 'be drawn furth of the buke', and removed from the council register.³⁴

Occasionally, a party would attempt to persuade the lords that they were barred from hearing an action due to an inhibition against them doing so by the king. However, the lords would tend to resist such submissions, and were even occasionally beseeched by the king to resist them. For example, in early February 1530/31 the chancellor registered a letter from the king which effectively ordered the lords to ignore any letters for continuation of causes obtained from him by 'inoportune solistatiouns'.³⁵ In case there was any doubt, this gave the lords any authority which they required to reject such applications. For example, on 13th February, a week and a half later, Robert Borthwick protested that despite presenting to the lords a writing from the king under his signet 'putting inhibition to thame to proceid apoun the letters purchest be Andro Murray against the said Robert quhill hes hienes war present himself', nevertheless the lords had proceeded anyway, 'sayand that thai war commandit be the kinges grace to minister justice equalie to all his lieges nochtwithstanding ony write quhilk may stop justice'. It would be tempting to see this as an expression of the autonomy of the session as a judicial body, but we have seen that the command of the king was contained in specific terms in the earlier charge to the lords, and therefore it cannot be said to reflect their general commission to administer justice.

³⁴SRO CS 5/42, f.12.

³⁵*Acts of the Lords of Council in Public Affairs 1501-1554*, ed. R.K. Hannay (Edinburgh, 1932), p.348.

Decision-making

The lords often appear to have employed a test of reasonableness in deciding whether a submission to them should be accepted or not, one example of this being when a party asked the lords to interpose their authority to a deed or agreement. In agreeing to such a request the lords would typically declare that it was 'thocht resonable'.

The reference to what was considered reasonable was, however, not purely formal or rhetorical, as can be seen in cases where the lords explicitly rejected a submission because it was unreasonable. An illustration of such a rejection may be taken from 31st July 1532, when the lords refused to implement a term in a lease because it was 'nocht resonable'. The abbot of Dryburgh had set the teinds of the church and parish of Saltoun to William Crichton, 'with conditione that he suld nocht suffer the teyndis of the parochin of Saltoun to be sett nor stakkit apoun the said kirklands under paine of tynsale of his tak'.³⁶ The lords decreed, however, that the abbot should allow the teinds to be 'sett and stak...nochtwithstanding the allegiance maid be the said Maister Robert [Galbraith, tutor to Lord Saltoun] in the contrar becaus the said lordes thinkes the said allegiance nocht resonable nor conforme to justice'.³⁷

Procedure: consent of party

Many procedures seem to have operated through the giving of the consent of parties in the cause. At least, there is often a formal note in the record that such consent has been given. Typical examples of this would be the procedure of continuing or

³⁶SRO CS 6/1, f.97.

³⁷Ibid.

advocating a cause. However, occasionally a party did object and withhold their consent, although this did not necessarily entail the halting of proceedings. For instance, on 26th July 1530 James and Adam Wallace 'dissassent to the continuation of the summonde aboune written', although they signalled that they would accept the 'act' of council in continuing the cause.³⁸ The action in question had already been continued, but now had ended up being called during the sittings of the Exchequer, and the lords continued it again because the king had instructed them that 'thai suld nocht proceid bot apoun chekkir materis'.³⁹

Advocation

Advocation was a procedure by which a legal action could be transferred from a 'lower' court to the session by order of the lords of session. It was a procedure by which the lords could bring an action before themselves if they thought it appropriate. It was used regularly by the period 1529-34, whereas in the period prior to 1506 it was apparently not used at all. Between 1529 and 1534 there are at least fourteen cases of advocation of an action to the session. From April 1528/29 to November 1530, a period of roughly eighteen months, there does not appear to be a single case. There is then one in November 1530,⁴⁰ one in July 1531,⁴¹ none at all in 1532, and, remarkably, no fewer than eleven in 1533, with a further one example in the first two months of 1534 (i.e. April and May). Since only a five-year period has been surveyed, it would be unreliable to regard this increase as evidence that the procedure of advocation was used increasingly from 1532 onwards. However, it certainly raises the possibility that after the foundation of the college of justice there

³⁸SRO CS 5/41, f.94.

³⁹Ibid.

⁴⁰SRO CS 5/41, f.120r.

⁴¹SRO CS 5/43, f.5v.

was a greater desire and willingness by the lords of session to advocate actions before themselves.

In eleven of the fourteen cases there is no doubt that a procedure was being used which was recognised by the parties and the lords as advocacy. This is because the word 'advocation' is used.⁴² In the other three this is a matter of inference.⁴³ Of these three, one is recognisably an advocacy in all but name, displaying similar procedural steps to those in the explicit cases of advocacy.⁴⁴ The other two stand out as involving a specific charge to the officers of the lower court to desist and cease their proceedings and to refer or remit the action to the lords of council, the effect of which seems identical to an advocacy.⁴⁵

These fourteen advocacy cases relate to a broad range of matters involving rights in land in particular, although two concern *spuilzie* and two concern debt. The subjects of the actions otherwise include rights to non-entries (a matter which in any case seems to have been within the exclusive jurisdiction of the lords), the reduction of infeftments, cognition of the possession of lands, of the existence of a tack over lands, of whether lands pertained to their possessor in heritage, and the reduction of a tack on lands which were held in ward.

In eight of the explicit advocacy cases the consent of the parties to the advocacy is recorded. In five of the other six cases no consent is mentioned. Two of them involve a charge to the lower court to remit the matter, one of which apparently followed from a writing from the king charging the lords to advocate the

⁴²SRO CS 5/43, f.5v.; CS 6/2, f.158v.; CS 6/2, f.182; CS 6/2, f.218; CS 6/3 f.58r.; CS 6/3, f.77; CS 6/3, f.80r.; CS 6/3, f.141v.; CS 6/3, f.150v; CS 6/4, f.2; CS 6/4, f.145v.

⁴³SRO CS 5/41, f. 120r.; CS 6/2, f.179v.; CS 6/3, f.141v.

⁴⁴*Ogilvy v. Garden*, SRO CS 5/41, f.120r.

⁴⁵*Lindsay v. Beton*, SRO CS 6/2, f.179v.; *Gray v. Achison and others*, SRO CS 6/3, f.141v.

action to themselves.⁴⁶ It is striking that of the three non-entry cases, in one it is recorded that the action is advocated with consent of the parties from the sheriff of Edinburgh,⁴⁷ whilst no consent is recorded in the other two. Presumably, consent was not required to advocate such an action, if only because the interests of the king were affected by it, and so the matter should have in any case been pursued before the council. Generally, though, it is not possible to demonstrate that the lords would or could use their power of advocacy against the will of one of the parties, even if it would seem likely that this was possible.

The actions in question were advocated from a variety of courts. Sometimes it was from a sheriff 'in that part' acting under commission. Other cases were advocated from the sheriffs of Edinburgh, Ayr, Peebles and Linlithgow, the regality court of St. Andrews, a bailie court in Tranent, the admiral court, and in one case simultaneous proceedings before the barony court of Burleigh and the sheriff of Kinross were both advocated to the lords.⁴⁸

It should be mentioned that there are other actions which may well be advocations in substance but have not been included for discussion because they are better characterised in a different way. For example, on 8th May 1534, in relation to an action called before the Commissary of Dunkeld, the lords ordained 'the mater to be callit and persewit befor thaim becaus it concerns the non-entries of land quhilkis perteins to the kings grace and he his thesaurer and advocat hes interes in the mater'.⁴⁹ This action had been treated as one concerning jurisdiction between courts, rather than the transfer of an action from one civil court to another.

⁴⁶*Barton and others v. earl of Bothwell and earl of Argyll*, SRO CS 6/3, f.58r.

⁴⁷*Carnis v. Leis*, SRO CS 6/2, f.182.

⁴⁸SRO CS 6/4, f.145v.

⁴⁹SRO CS 6/4, f.129v.

Advocation seems to have involved a fairly standard procedure, which is often mentioned in the directions given by the lords as to how the case is to proceed. If a matter was advocated from a court where proceedings had already commenced, then it would proceed before the lords not by summons, but by a 'simple bill of complaint', sometimes referred to as a simple supplication or bill. A simple bill of this sort required only fifteen days warning to proceed, but it was provided that the action would otherwise proceed as though it was 'a peremptour summons'. The other kind of direction given for how an advocated action should proceed was that it should be 'in the same maner as it suld or mycht have been procedit' before the judge from whom the action was being advocated.⁵⁰ Whether this even obviated the need for a bill is unclear.

Examination of witnesses

A party would sometimes compear simply to ask instruments of the recording of evidence. Upon occasion this could involve officials of the chancery giving evidence in relation to deeds engrossed by them. For instance, on 11th May 1529 the laird of Wauchton asked instruments that Thomas Ballantyne, the 'directour of the chancellarie', had been examined upon oath and had deponed that 'he understandis that Isobell Hopper renunciit hir coniunct fee of the landis of blakbarony and as he rememberis the instrument of renunciatioune bure reservand to hir the liverent of the same for all the dais of hir lif eftir the deceis of Johne of Murray'.⁵¹

Sometimes the record states some of the detailed aspects of the procedures for examining witnesses. For example, on 6th April 1530 Robert Galbraith asked

⁵⁰See e.g. *Dumduf v. Colquhoun*, SRO CS 6/3, f.77.

⁵¹SRO CS 5/40, f. 22.

instruments that the lords had assigned a certain number of individual lords to examine the witnesses produced by John Brown in an action between him and Andrew Balony and he 'protestit that thai suld be examinat apoun the interragneturs to be gevin in'.⁵²

Depositions of evidence from witnesses might be relevant to several different 'punctes' of a summons, and could be 'kepit in the register' for the lords to have further access to them prior to eventually giving sentence. James Douglas, earl of Morton, specifically requested the lords to take this course of action in his defence of an action against him by the bishop of Galloway on 20th March 1530/31.⁵³

The lords could issue a special commission to have witnesses examined and then to have sent back to them the resulting depositions. An example of this occurred on 22nd March 1530/31 in a case which also illustrates the ease of interaction between the civil and spiritual courts. The lords ordained letters to be directed in the form of a commission to the official and commissary of Moray to 'summond ressave and call witnesses apoun the intrometting with the teynd sharis' of the parsonage of Inverkeithing. The official was to 'sumonde the party to compeir at certane dayis to hear the witnesses suorne and except agaisn thaim and to clois the said depositiounis of the witnesses under thair seile'.⁵⁴ The depositions would then be sent to the lords, who having been 'avisit therewith' would give their sentence.⁵⁵

The session had power to send out its own officials to take evidence in exceptional circumstances. For example, on 27th July 1532 the lords ordained 'ane clerk of the court to pass over and examine the auld failzeit personis allegit that best

⁵²SRO CS 5/41, f.70.

⁵³SRO CS 5/41, f.131.

⁵⁴SRO CS 5/42, f.134.

⁵⁵Ibid.

knawis this mater becaus thai ar waik personis and in danger that thai deceis in the meyntime and that thir deposicions be closit quhill the said day [i.e. the proof, set for 8th November] reservand to the party all lauchful defences in this matter and agains the said witnesses'.⁵⁶

The power to have depositions taken elsewhere and then retoured to the session in Edinburgh extended to evidence taken abroad. On 13th August 1532, for example, in respect of money that was alleged to be owing by John Moffat, 'conservator of the privileges of the nation of the realme in Flanders', the lords continued the action for six months and ordained Moffat to 'have ane commission to the said lordis and jugis of the camfeir [i.e. Campvere] to ressave the witness to be productit be the saide Johne and writingis for preving thirof'. They also ordered the pursuer, John Barclay, a burgess of Edinburgh, to compear personally or by procurator in Campvere 'all the lauchfull dayis of the monethis of October, Novembre, Decembre & Januar' to see the witnesses sworn and writings produced, then to be retoured to the lords of council.⁵⁷

Similarly, this form of procedure can be seen operating in reverse upon occasion. On 27th November 1533, for example, the lords ordered depositions to be taken from a burgess of Edinburgh and an inhabitant of Leith, to be sent to the lords of Mechelen [i.e. the Grand council of Malines, in the Netherlands]. They had been presented with a supplication by John Forester of Leith in which he explained how James Watson of Flanders had shipped certain 'wyne and uther merchandice in the said Johns faderis schip and for fault of payment of the frauche [freight] thirof his fadir gart arest the said wyne'.⁵⁸ Following this, Watson's factor, James Henderson,

⁵⁶SRO CS 6/1, f.90v.

⁵⁷SRO CS 6/1, f.101v.

⁵⁸SRO CS 6/3, f.94.

'allegit that he causit lows the said arest and found Francis Aikman burgess of Edinburgh and John Dalmahoy in Leith sourteis...for the said frauch all that law will'. Moreover, he claims to have deposited certain monies with Francis and John to 'relief' them of the surety, all of which they deny. The problem which has arisen is that 'for that caus the said James Watson now cumis and pleyis the said Johne befor the lordis of Machlyne', and wants to call Francis and John before them 'be ane masour to declare the verite in the said matter'.⁵⁹ Now that the matter is before the session, and since Francis and John 'beand sworn and diligentlie examinat declarit that James Henrisone lest na money with thaim', the lords ordain a testimonial to be made to the lords of Mechelen 'for declaration of the verite'.⁶⁰

That there were risks present in relation to the reliability of taking such written depositions is brought out in a supplication of Gilbert Inglis which was heard on 20th June 1533. He explained that he was under summons before council and that the pursuer had had 'divers witnesses examinat to preve the punctis of hir summondis'. However, 'the witness has said planelie that thai war nocht examat apoun the punctis of the said summondis and the clerk writar of thir deposicionis wraite thame nocht as thai deponit'. He now wishes to summon the witnesses personally so that the 'verite' of the depositions can be established. The lords order the witnesses to be summoned to appear in six days, to be 'new examat'.⁶¹

Appeal

There was no appeal beyond council, but a party might try to have council itself review one of its own decisions. The method was to raise a summons for 'retreting'

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹SRO CS 6/2, f.194.

[reduction] of the decree. For example, on 30th July 1529 James Colville of Uchiltre supplicated the lords for permission to raise a summons for reduction of a decree of recognition 'sen the same was evill gevin and agains conscience', in response to which the lords ordained that he was to have a summons 'as he pleis libell'.⁶² A summons for reduction of a decree of spuilzie raised by George Arnot of that Ilk laid out three grounds justifying the remedy, on which the lords heard argument on 22nd March 1529/30. First, the claim was made that George had never been lawfully summoned and that the decree had correspondingly been given for 'null defence'. Second, the decree was given 'be depositionis of certaine suspect witnesses'. Third, the pursuer had 'na actione to persew', because the lands in question pertained to a third party in heritage, at the relevant date.⁶³ In this instance, however, the defender was assoilzied and 'quyte therefra in tyme tocum' from the summons 'as it is now libillit'.

An attempt on 30th March 1531 to have a decree reduced exhibits one of the few instances of the lords of council finding themselves to be 'na competent juges' to an action, although more in the sense of there being a bar and limitation on reducing the decree in question rather than a jurisdictional bar stemming from another court being the appropriate forum. The pursuers were the bishop, dean and chapter of Moray, and a chaplain to whose chaplaincy the land in issue had been mortified. They pleaded an exception that the lords were not competent judges for 'retraction' (reduction) of a decreet given by the lords of council in June 1496, because the decree had been 'alterit' since then and the lands mortified to the Church. The lords accepted that they could not reduce the decree 'becaus it is aboune the space of xxx yeiris bigane sen the said decrete was gevin and als the same was alterit sen syne and

⁶²SRO CS 5/40, f.79.

⁶³SRO CS 5/41, f.30.

the saidis lande mortifiit to the kirk'.⁶⁴ It appears that in 1496 Alexander Innes of that Ilk had been decreed to pay 300 merks to the earl of Buchan, who had recovered the debt by apprising the land now in issue. Because this land had been mortified to the church, the decree itself could not be reduced now, even though Alexander protested that he 'intendit nocht to desir na process of apprising nor mortificatioun to be reducit at this tyme'.⁶⁵

Occasionally, a party against whom decree had been given can be found protesting and alleging its nullity even before it has been pronounced. A case of this sort occurred on 31st March 1531, when Andrew Seton of Parbroath protested for 'nullitie of the said decret' which had been given in favour of William Scott of Montrose, 'in so far as it hapins to be gevin apon the thrid resone conteint in the sumonde rasit be the said Andro becaus thir wes na discussioun nor determinatioun maid be the lordes thirupoune and als becaus the lordis deliverit nocht determinantly geif it wer the practik'.⁶⁶ This example is particularly interesting since it involves such a specific allegation that the lords have erred in the manner of reaching their decision.

Though no appeal lay beyond council, and the lords clearly saw the remedy for an unjust decision as a summons for its reduction, this did not stop an aggrieved party occasionally challenging a decision of the lords with an appeal to parliament. On 18th January 1532/33, for example, Edward Cunningham complained that since the lords refused to pronounce a decree given for him, he 'appelit to the lordis of parliament' since he 'knewand him hurt thirin'.⁶⁷ Three days earlier the lords had refused to pronounce the decree since another party also had a decree in the matter,

⁶⁴SRO CS 5/42, f.154v.

⁶⁵SRO CS 5/42, f.155.

⁶⁶SRO CS 5/42, f.159v.

⁶⁷SRO CS 6/2, f.49.

which had to be reduced before Cunningham's could be given effect to.⁶⁸ However, the outcome of any 'appeal' to parliament in this case is not recorded, and there is no reference to such a complaint in the parliamentary register.

Whether or not such an appeal could be made to parliament, there is no doubt that the session could itself refer a matter to parliament where the law was ambiguous. There is an example of this in the parliamentary register on 10th June 1535. James Kennedy of Blairquhan and Thomas McLellane of Gelston were in dispute over the mails and duties of the lands of Castlecrook and Killemanoth in Wigtownshire, and were conducting litigation before the session. Thomas held the lands in heritage but James was his superior. Since Thomas had been at the horn for a year and a day, James laid claim to the mails and duties for the rest of Thomas' lifetime under the laws of the realm. However, the lords of session felt it necessary to refer 'to the Lordis thre estatis of parliament for interpretatioun of certane lawis of the realme schewin and producit befor the saidis lordis of Sessioun'. The question arose because 'the saidis lawis war variante in thir selfis'.⁶⁹ After hearing the parties, the lords of the articles made their finding as to what 'the use in tymes bigane hes bene' and enjoined that 'the saidis lawis suld be sa interprete and usit in tymes cuming'.⁷⁰

Interponing authority

The lords could be called upon to interpone their authority upon a private declaration or renunciation of rights, particularly in cases involving reversionary interests in land. For example, on 14th May 1529 Robert Galbraith appeared as procurator for

⁶⁸SRO CS 6/2, f.48.

⁶⁹*The Acts of the Parliament of Scotland*, ed. T. Thomsom and C. Innes (Edinburgh, 1882-1914), vol.ii, pp.349-50.

⁷⁰*Ibid.*

Patrick Brown, a burghess of Ayr, and on his behalf proceeded to 'renunce, overgeif and discharge all ryt and titill of ryt propirtie and possession that he has had or may have in and to the landis of borrowfeild of air...and renounces it, be ryt of ane reversion'. The lords interpone their authority to this renunciation.⁷¹

Another case would be when a minor sought to grant a charter, but desired the authority of the lords to be interponed so as to guarantee its status. On 6th August 1529 Gavin Douglas, canon of Aberdeen, and Thomas Annan, acting as procurators, compeared to produce two charters made by the earl Marischal 'with auctorite of his freyndis and curatoris and desirit the lordis of counsale to interpone thir auctorite thirto'. This was 'thocht resonable' by the lords in deciding to interpone their authority.⁷²

Abuse of process

Clear cases of abuse of process could be brought for speedy resolution before the lords. For example, on 30th July 1529 Alexander Snytoun, bailie to Lord St. John of his temple land in the burgh of Perth, compeared in an action against John Bisset, a messenger, and William Ruthven of Ballindene. An action was already ongoing in the bailie court concerning the lawful warning of a tenant, presumably a warning to remove, but William and his tutor 'purchest privat letters under our said souveraine lordis subscriptioun and nocht signettit be sinister informacioun chargeand the said ballie to proceid', which he had done already. The upshot was that the bailie had been put to the horn wrongfully. The lords therefore suspended the letters and the process of the horn.⁷³

⁷¹SRO CS 5/40, f.34.

⁷²SRO CS 5/40, f.87.

⁷³SRO CS 5/40, f.75.

Another kind of abuse was refraining from having a summons called while the defender was present, but going ahead after his departure. Obviously, the tabling of summonses to call cannot have simply been a bureaucratic procedure but must have depended also on the presence of the pursuer to initiate the calling. For example, on 6th August 1529 Lord Somerville's procurator, Robert Galbraith, protested that Lord Somerville had 'remanit continualie' for twelve days, 'dailie desirand to have process' in respect of a summons by John Somerville, but 'now the said lord was absent and the said Johne in his absence desirit to have his summondis callit'. Galbraith protested that for 'equite' he 'desirit ane term to call the said lord sa that he mycht be present and iustice ministerit'. John Somerville pointed out that Galbraith was already appearing as Lord Somerville's procurator, but Galbraith responded that a procurator was 'bot ane office of will and tharfor he wald nocht use the same at this tyme as ane procurator for the lord Somervale bot to excus him allanerlie'.⁷⁴

An abuse which was sometimes alleged was the obtaining of royal letters on false information. For example, on 19th January 1530/31 Andrew Baron alleged that he found himself under summons at the king's instance for forfeiture of land and goods for 'certane crymis of lese majestie quhilk can nocht be be [sic] the law but geif that he had committit cryme in the kings person his realm...and thirfor that the lords suld nocht proceed'.⁷⁵ Baron's explanation was that 'the kingis grace is wrang informit in that behalf be private insolicitatioun of certane personis bot that thai avistly consider the same conforme to the commonis law'. It appears that Baron was seeking to establish his rights to the estate of the late Sir William Brown, who had apparently been imputed with certain crimes. Incidentally, the case is also notable because the lords ruled that Baron and his co-defenders should not have to answer to

⁷⁴SRO CS 5/40, f.88v.

⁷⁵SRO CS 5/41, f.158.

the summons 'quhill thai compellit ane advocat or man to procurate for thame'.⁷⁶ An instance of such compulsion is to be found only a few days later on 23rd January 1530/31, when John Lethame, Thomas Marjoribanks and Henry Spittal protested that since they had been 'compellit be the lordis to procur' for John Tweedie of Drumelzier against Lord Fleming, that Lord Fleming should in person consent that 'thai mycht procure and use all thir diligence in the said mater without the displeasure of the said lord'.⁷⁷

Abuse of legal process could extend beyond the mere taking out of royal letters under a deception, and can be found in the holding of an inquest and the giving of a decree in contravention of an explicit inhibition from doing so. For example, on 26th January 1530/31 Paul Dishington and others called the bailies of the prior of Pittenweem before the lords along with the prior, for reduction of a decree given by them on 2nd September 1530, which reduced the tack and assedation of 80 acres of land in Fife granted by the prior to the late Thomas Dishington. The ground for reduction was argued to be 'becaus the said baillies procedit to the leding of the said process and gevin of the said pretendit decreet eftir and agains the inhibitioun maid to thaim in the said mater and efter that thai war dischargit of thir offices in that part for divers resonable caus'.⁷⁸ Moreover, the bailies had given decree in Paul Dishington's absence for 'null defences' and had done so within the tolbooth of Edinburgh 'quhar the pestilour was for the time'.⁷⁹ The lords correspondingly reduced the decree in the presence of all the principal defenders.

Access to copies of charters kept by the clerk register had to be regulated, and this was another area where abuse of legal process could occur. For example, on 4th

⁷⁶SRO CS 5/41, f.160.

⁷⁷SRO CS 5/42, f. 3v.

⁷⁸SRO CS 5/42, f. 10.

⁷⁹Ibid.

May 1531 David Blair of Adamton gave in a supplication complaining that William Hamilton of Sanquhar Lindsay 'laitly opteint ane deliverance' to the lord clerk register to deliver to him a copy of David's charter of the land of Adamton amongst other things, which was 'express agains all equite and reson that ane party quhilk daly persewis ane utheris heretage and without titill of rycht suld have the copy of his partyis charteris to arm him with'.⁸⁰ The lords agreed and ordained the clerk register not to deliver any such copies 'nochtwithstanding any deliverance or uther privat writinge purchest or to be purchest in the contrar'.⁸¹

Pleading of exceptions

The register usually gives little indication of the nature of the submissions on law which have been made prior to the lords reaching their decision in an action, beyond relating a summary of the grounds of action founded on in the summons. Allegations on the part of the defender are usually recorded when, for example, they lead onto a proof, such as when there has been an allegation that an instrument has been forged.

Occasionally, however, something of legal debate is recorded, as in arguments over what would today be called a preliminary plea to the relevancy. An example of this occurred on 8th May 1529, when Robert Leslie, forspekar for Lord Lovat, asked instruments that Adam Otterburn had produced a retour given for Lord Lovat concerning his being served heir to the lands of Lovat, and that Otterburn 'desirit to persew the retour of the dait anno 25 for reduction thirof'. Then there is recorded a classic statement of an argument to the relevancy, albeit with extreme concision: 'the said Maister Robert allegit alwayis that he denyit not the secund punct but said

⁸⁰SRO CS 5/42, f.178.

⁸¹Ibid.

the same was not relevant'.⁸² Two days later, Leslie appeared again to protest that 'thai war remufit apoun the relevance of the summondis of error protestand that thai suld nocht proceid further anent the said sumondis quhill he war callit to use his defence'.⁸³ In the event this action was referred to the discretion of the lords on the following day.⁸⁴

Relevancy was not simply a matter which might be raised by a defender. The lords themselves can be found upon occasion directing that a summons should be redrafted before being heard. For example, on 4th August 1529, in response to a summons raised by certain merchants from Danzig, the chancellor stated that the lords were 'redy' to hear the summons except that it was 'nocht weile libellit', and the merchants' procurator should devise 'ane relevant libell' instead.⁸⁵

Another kind of preliminary plea or exception was to claim personal exemption from the jurisdiction of the lords. For example, on 20th August 1529 Henry Spittal, on behalf of Alexander Spittal, pleaded an exception that Alexander 'was ane prest and suld nocht be haldin to answer befor the lordis'. In this case, however, the lords decided that he should answer, because he was summoned for intromitting with goods which pertained to the king as escheat by reason of bastardy. His status as a churchman did not of itself entitle him to exemption in such a case.⁸⁶

⁸²SRO CS 5/40, f.20.

⁸³SRO CS 5/40, f.21.

⁸⁴SRO CS 5/40, f.22.

⁸⁵SRO CS 5/40, f.82.

⁸⁶SRO CS 5/40, f.107v.

(ii) Supervisory jurisdiction

The use of the term 'supervisory jurisdiction' is not predicated upon the existence of a distinct jurisdiction exercised by the session over and above its usual one, but is used simply to characterise that part of its normal jurisdiction which has a supervisory character.

Supervision by the session of other courts

Part of the jurisdiction of council and session was supervisory in nature and related to the conduct of legal process in other courts. For example, in a case where a litigant alleged intimidation by another party or his or her supporters, the session could transfer the action to be heard elsewhere, in Edinburgh or else another part of the country. If transferred to Edinburgh the action could be heard in the tolbooth and the safety of all parties guaranteed to a reasonable degree. For example, Gilbert Wauchop of Niddry Marshall complained on 23rd August 1529 against John Edmonston of that Ilk in respect of a dispute between them about certain 'landis debatable'. Gilbert had been charged by the sheriff principal of Edinburgh and his depute to compear on the debatable ground itself to hear final sentence be given. However, 'at the first court day he durst nocht compeir to except agains the personnis that was apoun the inquest nor to use his iust defencis for feir of his lif becaus his said party gaderit agains him...for slauchter and distructioun'. Moreover, he had only had notice served on him on the previous day. Gilbert was personally present and John represented by a procurator, and with their consent the lords continued the court to be held from 'this instant day' and ordained the sheriff depute, officers of court and officers that were upon the inquest to compear in the tolbooth of Edinburgh. Gilbert was then to have the right to plead all his lawful exceptions

concerning the sheriff, the members of the court and those who served upon the inquest. In due course the sheriff and inquest are to proceed to 'pass apoun the ground of the landis pleyable, but nane of the partiis nor nane utheris in thir namis' are to compear upon the ground when sentence is given. In this way, the lords were able to intervene to regulate the procedure of a sheriff court in order to overcome the hazard of intimidation.⁸⁷

The lords could also decide on disputes over jurisdiction between two sheriffdoms. For example, on 31st August 1529 the sheriff of Renfrew, Lord Sempill, appeared in an action against the sheriff of Linlithgow, John Hamilton. The allegation was that Hamilton had wrongly called the free tenants of certain lands to give suit of court in the sheriff court of Linlithgow, and as a result of their non-compearance had 'unlawis thame and hes poyndit and takin thir gudis'. However, the lands in question 'ar anext to the sherifdom of Renfrew and ar haldin of our souveraine lord as Stewart of Scotland, and the tennentis of the saidis landis suld gef sute and service thirfor in the sheriff Court of Renfrew and hes bene in use of the same past memor of man'. The lords charged Hamilton to stop his proceedings and to restore the goods poynded. Without the exercise of this supervisory jurisdiction by the lords it is easy to imagine how deadlock could ensue and the matter remain unresolved between the two sheriffs.⁸⁸

Commissions could be granted out of chancery to constitute judges in a particular action, often as 'sheriffs in that part'. However, the lords could intervene to protect the interests of the judge ordinary who would otherwise have heard the action. On 16th October 1529 they suspended a commission constituting bailies in that part in the burgh of Lanark, for the serving of a brieve of succession in the

⁸⁷SRO CS 5/40, f.109.

⁸⁸SRO CS 5/40, f.113.

tolbooth of Edinburgh. The bailies of Lanark complained that the lands to which the heir was to be served were 'within the said burgh of Lanark quhilk commission is purchest without ony resonable caus in hurt of the previlege and fredome of the said burgh'.⁸⁹ The lords implicitly asserted their right to be the judges of what 'resonable caus' might be.

Another aspect of this supervisory jurisdiction was exempting an individual from the jurisdiction of a local court. For example, on 17th March 1529/30, such a summons of exemption was considered by the lords. It was raised by William Murray of Tullibardine, and was against the sheriff of Perth, Lord Ruthven. The exemption was claimed not only for William, but also 'his kyn, tenentes and servandes', and the exemption was to be 'fra the said sheriff and hes depute office and juresdictioun in all tym tocum'.⁹⁰ The summons is continued in this case, but an exemption is granted on an interim basis. The reason for the exemption is not given in this case, but typically would have related to feud or other personal enmity.

On other occasions an alleged suitor of court might turn to the session to resolve a dispute over his suit of court. For example, on 14th November 1530 William Cardney appeared under a supplication to complain that Lord Methven 'callis him and his tenents to his barony courte' for lands in the barony of Methven, but which William held directly of the Crown. Lord Methven insisted on 'sute and service' and 'unlawis poynde and take his gude therefor wrangusly'.⁹¹ The matter would have to be subject to proof and was accordingly continued.

⁸⁹SRO CS 5/40, f.126v.

⁹⁰SRO CS 5/41, f.16.

⁹¹SRO CS 5/41, f.123v.

Clashes between jurisdictions could also find their resolution before the session. For example, on 15th November 1530 Alexander Montgomery complained that whilst a lawful poinding had been executed, those men who had been poinded had taken out letters to the sheriff of Renfrew charging him to 'tak cognition geif the said Alexander spuillzie the gudis'. The complaint was that Alexander resided in the bailiary of Cunningham and that the sheriff of Renfrew had 'na jurisdiction apone him'.⁹² Montgomery also alleged that in the sheriff court of Renfrew he had formally made protest and taken instruments that he 'declynit the juge' and 'nocht entirit a pley effor him admittand him juge to him in the mater aboune written', but now the sheriff and his clerk would not deliver to him the 'autentik copy of the said protestation and actis'.⁹³ The lords were able to set the matter for proof and order the delivery of the documents.

The procedure of repledging allowed a lord to transfer to his own court an action which properly pertained to his jurisdiction but which had been raised initially in another forum. At common law this seems to have been the acknowledged means of asserting jurisdictional rights.⁹⁴ It is therefore telling to find an equivalent procedure in the session, where by using its supervisory jurisdiction it could bar proceedings in one court so that they might properly be raised in another and thereby effect a replegiation. Repledging would normally involve the courts of the two competing jurisdictions without reference to a third court of superior jurisdiction. An example of such an action in the session can be found on 15th March 1532/33, when James Douglas, earl of Morton, appeared against John Bannatyne, the holder of a liferent in Robertson in the earl's regality of Dalkeith within the sheriffdom of Lanark. Bannatyne had called some tenants of the land before the sheriff of Lanark for the

⁹²SRO CS 5/41, f.125.

⁹³Ibid.

⁹⁴*Regality of Dunfermline Court Book 1531-1538*, ed. J.M. Webster and A.A.M. Duncan (Dunfermline, 1953), pp.3-4.

taking of cognition and 'the said sheriff has set Tusday nixt tocum and sua tendis to draw the tenentis of the saidis land fra the said erle and his iuresdiction howbeit he is thir juge ordinar be resonis of his said regalite and thai suld be callit befor him', otherwise 'the same may hurt the said erle gretly in his office and privilege of regalite'.⁹⁵ The lords accept that such proceedings are 'preiudiciale' and suspend Bannatyne's letters. Whether it was simply more effective or expeditious or authoritative, the case illustrates an apparent preference for an action before the session to resolve a matter traditionally dealt with directly between two courts at common law.

Such might be the only recourse if an attempt to repledge failed. For example, on 28th May 1533 the provost and bailies of Montrose gave in a supplication against Robert Wood as admiral depute, complaining that James Rolland, an inhabitant of Flanders, had called William Scott, also a burgess of Montrose, before the admiral in pursuit of a sum of money due under an 'obligation'. However, they alleged that the admiral and his depute were 'na jugis competent...for dett' in these circumstances, 'but thai alanerlie'. Nevertheless, despite their request and accompanying offer of caution, the admiral would not admit their claims for repledging, and his depute was charged to send the 'autentik copy of the clame' for the lords to assess. The result in this case was that the admiral and his depute were charged to desist from any proceeding in the matter.⁹⁶

However, on another occasion the lords refused to intervene when the abbot of Holyrood complained that a man who lived within his regality was being sued for spuilzie before the sheriff of Edinburgh and his deputies who 'ar na competent jugis to the said Adam'. The abbot alleged himself to be 'hurt...gretulie in his privilege of

⁹⁵SRO CS 6/2, f.120v.

⁹⁶SRO CS 6/2, f.179v.

his said regalite', since he and his bailies were 'jugis ordinar in the said matter'.⁹⁷ However, the lords simply provided that 'it salbe lefull to him to replege Adam Dais to his courtis siclik as the saidis letters had nocht been grantit'.⁹⁸ Repledging was therefore competent but the lords were not prepared to stop proceedings before the sheriff of Edinburgh themselves. The implication is that it was up to the abbot to repledge, and only then would the lords intervene, if, for example, the sheriff refused to cooperate. In a case in March 1533/34 the lords refused to allow an action to be repledged from the sheriff of Ayr to the Stewart of Kyle 'because the said mater was enterit in pley befor the said sheriff of Air and his deputis and litiscontestation maid thirin'.⁹⁹ A plea to the jurisdiction of a court had to be entered at the appropriate preliminary stage of proceedings.

Those who exercised local jurisdictions such as sheriffs can also be seen recognising the jurisdiction of the lords to supervise their authority. For example, Hugh Campbell of Loudon, sheriff of Ayr, protested on 28th January 1530/31 that since the lords had previously ordained him to deputise John Crawford of Drongane and Adam Wallace of the Newton as his deputies in all actions pertaining to the laird of Blairquhan, that should the deputies 'procedit nocht justice' then he as sheriff should not be held responsible. The reason was that they were 'to sit and hald thir courte at the kirk of Allbay besyd the brig of Abine quhar he mycht nocht cum with his folke to se that justice war done'.¹⁰⁰ Exception had been taken to Hugh Campbell sitting upon the action due to the existence of a feud, and as sheriff he now sought to safeguard his position by entering a protest in the books of council. In this case James Kennedy of Blairquhan had sought a full exemption from the jurisdiction of

⁹⁷SRO CS 6/3, f. 127.

⁹⁸Ibid.

⁹⁹SRO CS 6/4, f. 100v.

¹⁰⁰SRO CS 5/42, f. 17v.

the sheriff, but the lords settled for the case being heard by appointed deputies, albeit in Deeside.¹⁰¹

A party who took objection to the jurisdiction of a court before which he was being sued would not necessarily succeed in having his complaint upheld by pursuing it before the lords. The lords would repel such complaints if the complainer had already appeared as a party to the proceedings in the relevant court, the test being, as already mentioned, whether *litiscontestation* had occurred. For example, on 31st March 1531 the lords ruled against William Scott, burgess of Montrose, in his attempt to have an action which had been brought against him by Gilbert Strachan before the conservator of Aberdeen declared incompetent. Having had the process produced to them, the lords '*ordanis the mater to be procedit upon and have process before the said conservator becaus the said Gilbert Strachauchin producit ane testimoniae under the seile of the conservator of Abydene quhare the said William Scott be hes procurator maid litiscontestation in the said matter*'.¹⁰² Seemingly, it had already '*procedit to divers actes and to the continuation in the mater befor the said conservator*'.¹⁰³

The jurisdiction of the session extended to examining the substance and form of the decrees of other courts. Indeed, some of the most typical actions before the session, such as that on a summons of error, were premised upon such a remit. However, even outwith such standard actions the lords were able to invalidate decrees and *rolments* of court if they were inadequate on the face of the record. For example, on 5th December 1533 the lords reduced three *rolments* of the earl of Eglinton as bailie of the regality of the abbey of Kilwinning which had been

¹⁰¹SRO CS 5/42, f.18v.

¹⁰²SRO CS 5/42, f.156.

¹⁰³*Ibid.*

delivered by an inquest on 2nd October 1527. The reason for the reduction was that 'the said rolmentis hes nowther form nor figur of sentence or decrete nor conteins ony caus relevant quharefor the said Janet [Fairlie] suld have bene decernit to have forfaltit hir said maling...'.¹⁰⁴ The bailie court did have the jurisdiction to make such a decision, but the lords were able to insist that due process of law be followed in its exercise. Moreover, the lords also went on to offer Janet a remedy when she appeared before them on 12th December 1533. She complained that the abbot of Kilwinning wanted to 'remove hir fra hir said maling wrangusly howbeit sche be rentalit thirof...quhilk rentale the said abbot will nocht now deliver to hir entendand be sic menis and wais to put hir to utir heirschip quhilk is ane agit wedow'.¹⁰⁵ The lords order the abbot to compear on 18th January to 'geif his aith quhidder he hes this rentale or not or geif he had it and geif he knawis geif this Jonet wes in the said rentale or nocht in tymes bipast', and they warn him that the matter will otherwise be referred to Janet's oath.

Regulation of legal process

It was another aspect of the supervisory jurisdiction of council and session to regulate legal process in other courts if called upon to do so. An example of this would be when a party had used an incompetent form of action. On 16th February 1530/31, for instance, Lady Bothwell complained that tenants of land which she held in liferent in Lanarkshire had claimed that they 'knawis nocht perfitlie the marchis thirof' and had taken out letters to the sheriff of Lanarkshire to take cognition on this question. However, she pointed out that 'the knawing of and schawing of marchis suld be brevis of perambulation and nocht be sic letters quharthrow the same is

¹⁰⁴SRO CS 6/3, f.114.

¹⁰⁵SRO CS 6/3, f.125v.

wrangwislie and unordourlie procedit'.¹⁰⁶ The lords accepted this and suspended the letters, going on to direct two men as 'justicis depute to pas aponis the ground of the said lande for perambulation thirof in dew forme'.

On 20th December 1533 a similar case arose of the wrong process being used. James Livingstone had purchased letters to the sheriff of Lanark to take cognition upon the ground right of thirl multures attaching to the mill of Robert Dalziel of that ilk. However, Robert complained that the sheriff was not a competent judge 'thirto be cognition bot be ane brieff of ryt or utheris wais requirit thirto of the law'.¹⁰⁷ The lords went on to reduce James' letters as 'unordourlie procedit' but the only reason given for this is 'becaus thai ar direct to tak cognition upon the ground ryt of the said thirle multur'.¹⁰⁸ It is not made clear whether the competent form of action would have been to raise an action in the session or to proceed under a different process before the sheriff. Given that multures were matters of fee and heritage, and given the desuetude of the brieve of right, it may be that the lords viewed a decision on ground right involving a matter of fee and heritage as being more appropriately brought before them.

Suspension of letters

Under a system of administration of justice where writs of various kinds could be issued upon purchase by a complainer as a purely administrative rather than judicial act, the lords of council had a fundamental role in policing the use of such writs. Typically, the party who found himself charged by royal writ to act in a certain way to which he objected would come before council to complain, and require those who

¹⁰⁶SRO CS 5/42, f.60.

¹⁰⁷SRO CS 6/3, f.142.

¹⁰⁸Ibid.

had taken out the letters to answer to his complaint. He would hope that it could be shown that they were not entitled to their writ, perhaps by proving that the underlying state of affairs, which the terms of the writ presupposed, did not exist. The remedy to be sought from the lords was suspension of the writ, and this would happen automatically if the other party failed to compear. For example, on 6th April 1529, Alexander Hay, parson of Turriff and tutor at law to William Hay, sixth earl of Errol, appeared before council under letters raised against Elizabeth Hay, countess of Errol, William's mother, and Ninian, Lord Ross, her spouse. Elizabeth had purchased letters in three forms requiring Alexander to pay to her and Ninian £40 per annum for past years and £80 for future years for their 'keping' of the earl and to pay for his 'sustentatioun'. Alexander, however, considered that the letters have been purchased by 'sinister and wrang informatioun'. In the event, neither Elizabeth nor Ninian compeared to produce their letters for examination whether they were 'ordourlie procedit and of justice or not', and Alexander thereby gained the remedy he required: suspension of Elizabeth's and Ninian's letters, although this was an interim measure 'ay quhill thai be productit'.¹⁰⁹

Letters of suspension could therefore themselves be suspended upon a relevant complaint. For example, on 10th April 1529 John Campbell of Lundy appeared before the lords under supplication in order to explain that Robert Leslie had been 'warnit be ane masour' to produce letters 'impetrat' by him in the name of Richard, Lord Innermeith, which had suspended letters purchased by John putting Richard to the horn. John protested that, since Robert would not produce these letters for examination, his letters should have effect after all. The lords 'admittit' this protest.¹¹⁰

¹⁰⁹SRO CS 5/40, f.8.

¹¹⁰SRO CS 5/40, f.9.

Part of the reason for seeking suspension of such letters could be that a party with an interest to defend had not been called to appear when the letters were granted. This ground underlay the complaint of George Pettullo on 16th April 1529, in respect of the fruits of a chaplaincy to which he had been 'lauchfully providit', and had 'the ordinar letters with our souveraine lordes letters conform thirto be deliverance of the lordis of counsale to mak him be answerit of the frutis thirof '. The defender, David Crammond, had also taken out royal letters to execute diligence for the fruits of the chaplaincy extending back two years. Pettullo alleged that Crammond had been issued with these letters 'be sinister and wrang information and without cognition in the caus'. The implication of the phrase 'without cognition in the caus' would seem to be that the letters issued to David Crammond had not been issued by deliverance of the lords of council or by virtue of court process, and therefore without any judicial determination of the issue in question. The alleged flaw in this procedure had been that Pettullo had never been 'callit thirto for his enteres'. The lords of council were called upon to examine David's letters to determine whether they were 'ordourly procedit', but since he failed to compear the letters were suspended until they were produced before the lords.¹¹¹

This kind of challenge to the legality or competence of writs and letters could easily lead to abuse of process, and the large number of actions throughout the council register relating to suspension of letters may imply that this kind of abuse was fairly common, as parties manipulated legal process tactically so as to inconvenience their opponents and delay a formal resolution of the issue. For example, on 6th April 1529 Rolland Donaldson's letters interdicting Sir Alexander Scott from alienating property to the defrauding of his creditors were suspended at Alexander's instance, Rolland not compearing to contest the action. However, the

¹¹¹SRO CS 5/40, f.10.

matter is put in a different light on 16th April when Rolland did compear and had his letters of interdict declared 'ordourly procedit'. Rolland explained that Alexander had indeed called him 'be ane masour' befor the lords but went on to allege that 'als lang as he was present the said Sir Alexander wald nocht cum and persew the same and in said Rollandis absence the said Sir Alexander has for null defence gettin ane act suspendand the said letters ayand quhill productit'.¹¹² On this occasion Alexander was the one who did not compear and Rolland saw the suspension lifted.

Normally, if a pursuer refused to appear to hear his summons called, the defender was entitled to have the action dismissed so that the pursuer would have to start again with the serving of a new summons. For example, on 8th May 1529 Lord Livingstone protested that he had been summoned at the instance of the king and his advocate, Adam Otterburn, for reduction of an instrument of sasine, but Otterburn 'wald nocht compeir to persew the said summondis' and therefore 'he suld nocht [be] compellit to answer in the said mater quhill he war summond of new and his expens refundit'. The lords declared that he should not be compelled to answer in the matter until 'warnit be new letters thirto apoun 20 dais warning'.¹¹³ This step was with the consent of Otterburn, and the reasons why he did not pursue the summons are not stated.

Suspension was, of course, an interim remedy, but the lords could also proceed to declare letters simply void and therefore reduce them. For example, on 29th March 1530 a procurator asked instruments to record the fact that letters of removing directed to the sheriff of Fife in respect of property, possession of which was disputed, were reduced because 'the sheriff excedat the bounds of hes office in

¹¹²SRO CS 5/40, f.10v.

¹¹³SRO CS 5/40, f.20.

execution thereof'.¹¹⁴ It should be remarked, incidentally, that reduction on such grounds would seem consistent with both the lords' general jurisdiction over reduction and their jurisdiction over royal officers and courts which was supervisory in character.

When legal actions were pursued in more than one court, but in connection with the same dispute, the session played an important supervisory role as well, and the remedy of suspension could be used to prevent an action proceeding in more than one court. One example is where action in the sheriff court led to another action in the session on a related but subsidiary matter, but a party then tried to re-raise the action in the sheriff court before the session had come to the decision upon which the sheriff court action depended. For example, on 28th April 1529 a dispute came before the lords which had arisen over two conflicting leases in the barony of Marnoch in Ayrshire. Patrick Hamilton of Boreland claimed the assedation of these lands, held of Alexander Hepburn of Richardton, and that his lease was to run for another five years. However, John McAdam also claimed to hold the lands under an assedation from Alexander, and had called Patrick before the sheriff of Ayr for spuilzie of himself 'furth of said maling' and had 'optenit ane rolment of court agains' Patrick. However, Patrick had then obtained a decree of the lords of council which decerned the rolment of 'nane avale'. Following this, both assedations had been produced before the lords of council in the presence of the alleged grantor, Alexander, to whose oath was referred the question 'quhilk of thaim was just and of verite'. Alexander was granted a continuation so that he could be 'avisit' on the matter. However, in the meantime, John McAdam had taken out new letters to the sheriff of Ayr to take cognition in this matter, despite the fact that Alexander had not

¹¹⁴SRO CS 5/41, f.47v.

yet declared the 'verite' of their assedations. McAdam did not compear and the lords suspended his newly obtained letters until they were produced for examination.¹¹⁵

Impreving of instruments

An action commonly raised before the session was that of impreving (proving invalid) instruments or deeds. Typically, such a deed might be a reversion, whereby land was held under a condition that a third party had the right to take it back upon payment of an agreed sum. For example, on 30th April 1529 Thomas Duddingston of Southhouse called Janet Duddingston, daughter of the late Alexander Duddingston, before the session. Janet claimed to have an instrument 'berand in effect that umquhile Williame Duddingstoun the gudschir to Thomas gaif to umquhile Alexander heretablie the landis of Westlogy undir reversioun contenand sum of 300 merks'. However, Thomas alleged this instrument to be 'fals and fenzeit in the self' and wished it to be 'sene and considerit' by the lords and to 'heir and see' it be 'civile imprevit'. In this case the action was continued so that Thomas might summon both the witnesses named in the instrument and also 'the kepar of the Notaris protocol buke to produce the same'.¹¹⁶ This occurred on 14th May 1529, when the instrument was 'improved' by witnesses giving evidence that the notary by whom it was claimed the instrument had been made had handwriting different from that in the instrument. The witnesses named in the instrument and 'divers notaris and autentik notaris quhilkis knew the said umquhile M. Nicholl and his writingis and be inspectioun of divers autentik instruments under said M. Nicholes signe and subscriptione ferr deferent baith in writting and proportioun fra the signe manuale of the fenzeit instrument'.¹¹⁷

¹¹⁵SRO CS 5/40, f.14v.

¹¹⁶SRO CS 5/40, f.15.

¹¹⁷SRO CS 5/40, f.35v.

A ground of reduction of an instrument might be that it had not been issued in proper accordance with the 'ordour of the chancellarie', if it was a writ issued out of chancery, such as a precept of sasine. An example of a reduction action of this sort occurred on 24th February 1530/31, when the countess of Cassillis alleged that a precept had been 'counterfetit by the ordoure of the chancellarie but ony retour brief or uther warand passand of befor'.¹¹⁸

Leases

The lords' jurisdiction to reduce heritable infeftments has been examined elsewhere in this thesis. However, this is only one instance of their general jurisdiction to reduce instruments. They also had jurisdiction to declare a lease void through reduction.

For example, on 28th March 1530 William Stewart, the provost of Lincluden, appeared in an action against multiple defenders, including James Douglas of Drumlanrig, Lady Borthwick and William McClellan, tutor of Bombie. The defenders were 'to heir and see the pretendit takis maid to thaim and ilkane of thame of the lands undirwrittin...pertaining to the college and provost of Lincluden be ane reverend fader in God David Bishop of Galloway and be Henry now Bishop of Galloway to be decernt be the decrete of the lordis of counsale to have bene fra the begynning and to be now and in all tymis cuming of nane availe'.¹¹⁹ This the lords did, because they accepted that the bishops 'had nene ryght in and to the said provostry, as had already apparently been decided by the pope and auditors of the Roman rota. The right of the provost to set, use and dispone the lands was upheld,

¹¹⁸SRO CS 5/42, f.54.

¹¹⁹SRO CS 5/41, f.40.

although actions of warrandice were reserved to the tack holders against the bishop'.¹²⁰

Constitution into an office

Throughout the council register are notes of compearances by individuals to appoint or 'constitute' men to the office of procurator in order that they might be represented in court. However, this is only one particular instance of a wider phenomenon of coming before the lords to be constituted into a variety of offices, particularly ones which entailed representation of the interests of a third party. For example, on 7th May 1529 Allan Hamilton of Bardowny compeared to constitute as his curators *ad lites et negotia* Nichol Crawford, the justice clerk, and William Stirling of Glorat.¹²¹

Conversely, individuals would sometimes appear before the lords to formalise their discharge of office. For example, on 22nd May 1529 James Foulis protested that he had been chosen as an arbiter by John Somerville, but that 'the said John wald nocht compeir to geif him informatioun'. He therefore wished to be 'exonerat of his aith and his conscience anent the said mater'.¹²²

Other offices carried property rights, such as to receive the fruits of certain lands, and conflicting claims to such offices could be brought for resolution before the lords. For example, also on 22nd May 1529, Walter Kennedy, parish clerk of the Inch, appeared in an action against Henry Arnot who 'clamand the said parroche clerkship to pertene to him' and 'trublit the said M. Walter and the parochinaris of the said kirk thrifor befor ane reverend fader in God Henry bischop of Galloway &

¹²⁰Ibid.

¹²¹SRO CS 5/40, f.18v.

¹²²SRO CS 5/40, f.24v.

his commissaris'.¹²³ Walter's complaint was that he and the parishioners had appealed to the archbishop of Glasgow, but Henry had already taken out letters to be answered to for the fruits. In this case the lords did not decide upon the right to the office, but suspended Henry's letters in the interim, thereby demonstrating incidentally the smooth interaction between legal process in the church courts and the council.

Another kind of office or status which parties would take upon themselves with formal notice to the court was that of cautioner. Thus, for example, on 22nd May 1529 Alexander Ogilvy of Finlater compeared and 'oblist him to releif and keip scathless' Lord Lovat in relation to payment of 300 merks, in part payment of an overall sum of 750 merks which Lord Lovat owed to Margaret Tudor, the Queen Dowager.¹²⁴ Parties would also compear to 'become lawborowis'.¹²⁵

Apart from being constituted a procurator, there were other offices of the court such as a sheriff 'in that part', to which the holders were sworn in before council. For example, on 14th July 1529, while the exchequer was still sitting, James Johnston and John Produven, macers of the court, compeared to swear that 'thai suld lelely and trewly minister in the office of sheriffship within the tolbutth of Edinburgh anent the cognition taking apoun the commissioun rasit...tuching the land of Pollinfeith...and half landis of Sandelandis...'.¹²⁶

¹²³SRO CS 5/40, f.24v.

¹²⁴SRO CS 5/40, f.44.

¹²⁵SRO CS 5/40, f.93v.

¹²⁶SRO CS 5/40, f.57.

Deforcement of messengers

The council's jurisdiction extended to overseeing the enforcement of its decrees, and a common action was a summons in the name of the king's advocate against men who had deforced a royal messenger in the course of his duties, most often in the execution of diligence to enforce a decree for debt.

Such an action occurred on 15th April 1529, with a summons against John Oliphant and Alexander Smith, chaplain, in relation to a deforcement on 16th February, some two months earlier. A messenger, Robert Chapman, had travelled to the lands and barony of Kelly with royal letters issued 'be deliverance' of the lords of council, in order to poind some movable goods for payment of 40 merks annual rent owed to the master and bedesmen of the Hospital of Our Lady and St. Paul's Work. The allegation was that the defenders had 'violentlie stoppit and tuke the said gudis fra the said officiar and deforsit him in the execution of his office', and they were now to answer to the king and his advocate for the 'contemptioun done to his hienes and to be punist'.¹²⁷ The defenders in this case failed to compear and it was decreed that they had done 'wrang' and were to be punished. In another case, on 5th May 1529, relating to the deforcement of William Duncan, three horses had been poinded by William and it was as he was delivering them to market for apprising that the defenders came upon him, took back the horses and thereby deforced him in the execution of his office. The record in this case vividly describes William's response, which was that he 'brak his wand and tuk witness'.¹²⁸

¹²⁷SRO CS 5/40, f.9v.

¹²⁸SRO CS 5/40, f.16v.

Tinsel of office

Part of the traditional jurisdiction of the king's council was to exercise a disciplinary jurisdiction over royal officers, and this is illustrated in an action in the king's name against Lord Lindsay, the sheriff of Fife, on 1st June 1529. The basis of the action was an act of parliament which established that a sheriff should forfeit his office for culpable or partial proceeding in the administration of justice. In this case Lord Lindsay was held to have 'parcially and wilfully procedit in the sheriff court of Fiff' in respect of a claim to lands by parties who had already been held to have spuilzied the lands from the rightful occupier by decree of the lords of council, and after letters had been issued charging the sheriff and his deputies not to proceed against that defender until he had been restored to his lands.¹²⁹ On this basis he forfeited his office and within two weeks letters had been served on him demanding that he hand over to a macer his seal and signet of office and his court book and related writings and rolments. We know this because on 15th June 1529 Lord Lindsay compeared personally to complain at this course of action.¹³⁰

Tinsel of property

Alongside reducing an infestment which they declared to be invalid, the lords also had jurisdiction to declare someone forfeited of their lands through failure to perform their obligations to a superior or landlord. For example, on 23rd July 1529, the earl of Crawford was found to have forfeited his tack of lands in the sheriffdom of Fife because he had 'nocht maid payment of the mailis fermes and dewiteis thirof eftir the form of the rentale'. The land is now to 'turn again to the kingis grace to be

¹²⁹SRO CS 5/40, f.49r.

¹³⁰SRO CS 5/40, f.55.

disponit be his hienes as he sall think maist expedient'.¹³¹ Having failed to appear, the earl of Crawford turned up the following day protesting.¹³² A similar action failed on 30th March 1530. It was in relation to a summons to hear James Grant of Freuchy to have 'tynt and forfaitit hes heritage of the saide landes because he and hes fadir had failzeit to pay to our souveraine lord the said few be the space of 17 years'. The king sought payment of the 'few mailis' as well, which was granted. However, Grant did not forfeit his property because he was able to produce 'ane writing under the privy seile ratifiand and apprevand the charter of few maid to the said umquhile Johne the Grant of the said landes'. James Grant apparently claimed that he had paid these mails to the earl of Moray over this period, and an action on this account was reserved to him.¹³³ Although the king failed to seize the land in question, the action was successful in gathering revenue and can be seen as an illustration of many royal actions which were motivated by the desire to increase revenue to the Crown which in turn sustained royal patronage. Concerted efforts to raise summonses of error and to collect feudal casualties or to apprise lands in lieu of payment of such dues are all evidence of this.

By the same token, a superior could forfeit his superiority for failing in his obligations towards his vassals. For example, on 7th November 1530 John Charteris forfeited his superiority over lands in Perthshire for his lifetime, because he had been charged by his vassal Janet Gray, Lady Wemyss, to enter to his superiority, and had failed to do so. Lady Wemyss and her spouse were to be entered into their lands and to hold of their oversuperior for her lifetime.¹³⁴ The penalty suffered by a vassal whose superior did not enter the superiority is brought out in a similar action five days later by Thomas Colquhoun. The allegation was that the superior 'lyis out in

¹³¹SRO CS 5/40, f.68v.

¹³²SRO CS 5/40, f.69.

¹³³SRO CS 5/41, f.50.

¹³⁴SRO CS 5/41, f.118.

defraud of the said Thomas and will nocht entir to his superiorite thereof causand the said Thomas thairthrow to want his mails and deweteis'.¹³⁵

Generally, the session seems to have been seen as a particularly appropriate forum for airing and resolving disputes arising from relations between vassal and superior in respect of the tenorial bond. For example, on 24th January 1530/31 the earl of Rothes compeared to protest that, although he had called Robert Lumsden to compear before him in his court ten days earlier, in the chapel of Glendook, to receive new infeftment of certain lands after the form of his 'auld infeftment', Robert refused. Now the earl 'as of befor in the presens of the saidis lordis requirit him personalie thirto and offerit him ready to infeft the said Robert', protesting that the land should meanwhile be regarded as in non-entry.¹³⁶

Forfeiture

It was the council which was used as the judicial instrument by which the penalties for crimes such as treason were put into effect. For example, after the earl of Angus had been convicted of treason and lese-majesty in parliament in September 1528, his property was confiscated as an escheat to the Crown through forfeiture. The effect of this upon particular properties can also be seen in legal process before council. For example, on 22nd March 1528/29 Adam Otterburn (as king's advocate) appeared in an action against the free tenants of Kirriemuir in order to seek a declarator from the lords of council that the lands and lordship of the regality of Kirriemuir now pertained to the king in property, having been the heritable property of Archibald Douglas, sixth earl of Angus. The crucial point of this for the holders of the

¹³⁵SRO CS 5/41, f.122v.

¹³⁶SRO CS 5/42, f.4v.

'tenandrys' was that the property was now to be 'brukit and disponit be his hienes at his pleasour in tym cuming according to the said process and dome of forfaltour'.¹³⁷

(iii) Actions relating to property

Protection of property rights

The lords of council would give remedies against dispossession from property, including heritable property, mainly under actions of spuilzie, wrongous occupation and ejection. However, they did not merely safeguard possession but would also adjudicate over conflicting claims of title, and correspondingly protect the possession of one who could show rightful title.

For example, on 12th April 1529 Andrew Murray of Blackbarony compeared against Adam Dundas and complained that Adam had obtained a 'pretendit' gift from the king of Andrew's feuferme lands and heritage of Ballincrieff, since he alleged that they had been his mother's conjunct fee lands and had come into the king's hands as escheat. Andrew alleged that this was 'sinistre informatioun and nocht of verite for his modir has na coniunctfeftment thirof bot hir terce allanerlie'. Adam was to produce his gift and the letters he had obtained as a consequence of it. Both parties were present in court, and the lords gave decree that Adam should 'decist and ceis' from intromitting with the lands in question 'to be brokit and joisit be Andro as he sall think expedient eftir the forme and tenour of his charter of few and instrument of seising thirupoun'.¹³⁸

¹³⁷SRO CS 5/40, f.7r.

¹³⁸SRO CS 5/40, f.9r.

On 22nd May 1529 we find the lords assessing claims to mails, fermes, profits and duties under escheat against a newly infeft proprietor of the land in question. Patrick Hepburn of Wauchton had received from the king the assignation of the escheat of the land, property and tenandry, in the sheriffdom of Peebles, which had belonged to Elizabeth Hoppar, the spouse of Archibald Douglas of Kilspindie, who had been forfeited. He had already 'apprehendit' sheep and other goods from the land, and the lords held that these were correctly his escheat goods because they were in Archibald and Elizabeth's possession when Archibald was forfeited. However, the lords refused to award the mails of the land to Patrick since they 'has sene ane autentik instrument of saising bering in effect that the said Andro Murray is saisit in the samyn'. Andrew Murray's instrument of sasine is to be considered valid unless it is reduced 'or ellis ane sufficient reservacioun of the said Isabellis coniunctfeftment of the saidis landis be schawn and producit'.¹³⁹

Clearly, then, the lords would look to the underlying right in land which a possessor claimed and would if necessary adjudicate upon competing instances of such rights. The language of the record brings this out clearly in a decision of the king which was registered on 3rd June 1529. A party was to 'produce and schaw the day befor his grace ane gretar richt...for the broiking and joising of the landis', but failed in this and 'schew na ryt nor comperit', and so had decree awarded against him.¹⁴⁰

Given the need to prove the nature of the title under which the land was held, a party would sometimes come before council simply in the hope of getting an order to another party to hand over some such evidence as a charter which it was alleged he or she was withholding. Alexander Shaw of Sauchy sought this remedy against

¹³⁹SRO CS 5/40, f.26.

¹⁴⁰SRO CS 5/40, f.51v.

William Lumsden of Ardre in Fife, and was granted a continuation to prove his allegations.¹⁴¹

Possession

One particular case illustrates a party using the concept of 'possession in good faith' in the context of a claim which in this instance seems to be based on grounds of unjust enrichment, although in the context of a dispute over title. The procurator for Janet Rowat, the defender, gave in a 'protestation' in connection with a dispute over title to a house. The pursuer claimed to have been seised of the property prior to the defender. However, the point of the protest is to argue that even if the court were to accept the pursuer's claim, nevertheless, since the defenders had incurred expense in maintaining the property, they should be paid for their expense before being required to give up possession. They 'puttand ane meikle ruff apoun the same', and incurred expenses of 300 merks which they want 'refundit and payit'. The justification offered is that 'we war in actuale possession be chartir and seising' and were therefore 'bone fidei possessiares', and at the very least no decree of reduction of the sasine should be given before the expenses are refunded.¹⁴² The lords assigned a day for both sides to produce 'sic lawis and resonis quhy the protestatioun aboune written suld be admittit and have effect'. The case is a rare illustration of the record containing a relatively clear statement of the legal arguments which underlay a dispute.

¹⁴¹SRO CS 5/40, f.55.

¹⁴²SRO CS 5/42, f.3.

Error

A common action raised in the king's name was that of the summons of error, whereby the retour of an inquest which had purported to serve an heir to lands was reduced. The action could be against the sheriff, members of the inquest and the alleged heir. A typical example is the action which was heard on 21st May 1529, in relation to a brieve of inquest raised by Robert Bruce. In this case the error lay in retouring wrongly the tenure under which the land was held: blanchferme, even though there were 'na evidentis thirupon shown to inquest'.¹⁴³ This action was actually the first in a string of six heard that day. In another case, the complaint was 'inordinat proceding' because of failure to produce an instrument of sasine of the deceased man, and undervaluing of the lands in question.¹⁴⁴ On the following day, the complaint was against John Ross, son of Walter Ross, 'pretendit' sheriff depute of Elgin and Forres, for 'inordinat and parciale process' through proceeding on the serving of the brieve of inquest whilst 'havand na power nor commission thirto bot as ane privat persoun havand na iurisdictione'.¹⁴⁵ Also from a more technical point of view, the inquest had been held in time of parliament without a dispensation. In the decree the retour is reduced explicitly for the latter reason.

There was a variety of further technical reasons which could ground an action of error. In one instance it was alleged that the brieve had been put to an inquest despite 'nocht beand lauchfullie proclamit and the membris of court nocht sufficientlie suorne thirto'.¹⁴⁶ A subsidiary factor in this case was that an inhibition

¹⁴³SRO CS 5/40, f.40.

¹⁴⁴*King v. Alexander Bailze etc*, SRO CS 5/40, f.40v.

¹⁴⁵SRO CS 5/40, f.43v.

¹⁴⁶*King v. William Hamilton*, SRO CS 5/40, f.47.

had been put on the inquest against all proceedings, at the instance of the 'donatour' of the ward and lands in question, since he was in France in the king's service.¹⁴⁷

Another cause of error was that the inquest had been mistaken in assessing who the nearest lawful heir was. For example, on 23rd July 1529 the retour serving Margaret Hope as heir to John Hogg of Foulshland was reduced because the inquest found Margaret heir 'howbeit William Hogg is brother jarman and nerest and lauchful air'.¹⁴⁸ Equally, objection might be taken to the persons on the inquest as 'suspect',¹⁴⁹ or to the way they gave their retour: for example, because 'thai answerit not noyther affirmative nor negative to the punctis of the said breif'.¹⁵⁰

Decrees of error were, however, themselves subject to reduction. For example, on 4th April 1530 the lords reduced such a decree after hearing submissions that 'the said sumondes was never tabulit by the tolbuthe dure', that it had not been raised or pursued within three years, and that the inquest had not been wrong in ascertaining who had died last seised in the land.¹⁵¹ The decree of error being reduced, the lords ordained the original retour to stand.

A summons of error did not lie only against an inquest of succession. Other actions such as a process of apprising could also be the subject of such a summons of error. For example, on 23rd March 1530/31 Oliver Maxton, a macer and sheriff 'in that part', was sued by a summons of error in relation to his apprising of the lands and goods of David Boswell of Glassmount. In this case the process of apprising was challenged on the basis that 'thai procedit in the halding of the saide lande for

¹⁴⁷Ibid.

¹⁴⁸SRO CS 5/40, f.67.

¹⁴⁹SRO CS 5/40, f.77.

¹⁵⁰Ibid.

¹⁵¹SRO CS 5/41, f.64v.

sum of 400 mk as pertaining to David Boswell in heritage' when the contrary was true, and it pertained to William Larbert in heritage. The challenge failed, however, and the record baldly states that the lords assoilzied the defenders.¹⁵²

Redemption of lands

The redemption of lands under a reversion was often considered a transaction of such importance that it ought to be carried out or registered in the presence of the lords of council, particularly in cases where there had been dispute over some aspect of the redemption. A typical example is the compearance on 15th July 1529 of Alexander Inglis of Tarvit and William Inglis, vicar of Cupar, his curator, to renounce 'all clame of ryt that thai have or micht have in and to the landis of Wemyss Tervale'. This land had been redeemed by David Wemyss of that Ilk, and Alexander now 'deliverit in presence of said lordis' his 'evidentis' relating to the land and 'made faith that thai had na ma evidentis of the same and that thai had done exact deligence to seik and gett all evidentis pertaining thirto'. A decree had been given against Alexander and his curator on this account, and the lords now discharged the process of the horn which had been led against them.¹⁵³

Transactions involving reversions could also lead to disputes. The buyer of land might refuse to deliver a reversion, thus depriving the seller of the legal document necessary to redeem the land in the future. On 20th March 1530/31, for example, John Ormiston complained to the lords that Alexander Cockburn and his spouse had not yet delivered to him a reversion of land which 'he sauld and analyit thame...heretablie be charter and seising...and thai band and oblist thaim to have

¹⁵²SRO CS 5/42, f.139.

¹⁵³SRO CS 5/40, f.60v.

deliverit to him ane reversion in dew form for redemption of the saide lande...'.¹⁵⁴ Although Ormiston alleged this to be 'incontrar the band and oblissing', the lords assoilzied the defenders without explanation in the record.

In another similar case on 31st March 1531, John Lindsay of Colinton complained that having charged Janet Telfer, relict of John Graham, burgess of Edinburgh, to deliver a reversion to him or enter into ward, failing which be put to the horn, she had entered into ward in the castle of Blackness 'to eschew the process of the horn and to caus the said Johne tyne the privelege of the redemptioun of hes auld heritage sche fraudfully enterit in ward...and thir to remain all hir dayis sche beand ane agit woman and able hastelie to de'.¹⁵⁵

Ejection and wrongous occupation

An action often associated with spuilzie and just as common was for ejection, which was when someone was dispossessed of his or her land. An example on 5th May 1529 was the action of James Johnston, burgess of Edinburgh, against Nichol Moffat and John Johnston for 'wrangous violent and maisterful intromitting, occupatioune, ejectiounne and outputting' of two tenants of James's, from the land of Blacklaw which he possessed in heritage in the stewartry of Annandale. The 'outputting' occurred in 1522, and the action encompassed the wrongous withholding of the profits of the land over a seven-year period. The lords decreed that Nichol and John had done wrong and should desist and cease from occupying the lands, and that James should enjoy possession of them under his infeftment. These were,

¹⁵⁴SRO CS 5/42, f.131v.

¹⁵⁵SRO CS 5/42, f.156.

incidentally, the standard terms in which accounts of such actions in the record were narrated.¹⁵⁶

Sometimes an action was concerned solely with recovering the profits of land which had been wrongously occupied, in which case the ground of action would be the intromitting with and withholding of profits. James Johnson had an action of this sort on 5th May 1529, which was for payment of 'the malis and proffitis that he mycht haif had of ane third part of his landis of Nether Blaklawis', which lands had been withheld from him 'without tak or licence' for ten years.¹⁵⁷

Clearly, in an action for ejection the nature of the possession claimed might come under challenge from an opponent. For example, on 16th July 1529 Sir John Campbell of Lundy and his wife, Dame Elizabeth Gray, who held the lands of Pettormo in conjunct fee, appeared against James Gray, who had been under summons of spuilzie and ejection a month earlier by Elizabeth and her children. However, James alleged that 'sche had na uther possessioun bot came to his place in freindle manere as sche was wonit to do and remanit twa nytis thirin and departit at hir awin pleasour and quhen sche ged furth of the gett his servand stekit the gett and held hir furth'.¹⁵⁸ James claimed to hold the land under a tack of the previous proprietor, Lord Lyle.¹⁵⁹

Ejection and wrongous occupation were civil actions, but occasionally the lords entertained actions which were in substance the same but which were libelled almost in the form of a criminal action, such as might be indicted in the justice ayres. For example, on 29th March 1530, we find an action alleging 'wrang' in the 'violent

¹⁵⁶SRO CS 5/40, f.17v.

¹⁵⁷SRO CS 5/40, f.17.

¹⁵⁸SRO CS 5/40, f.61v.

¹⁵⁹SRO CS 5/40, f.62v.

and maisterful laying waist of the 40 s. land of auld extent...throw manissing [menacing] and baisting [beating] of tennentes and servandes and putting of thaimie and thir servandis furth of the said maling', which was held under assedation. Moreover, the defender had wrongly 'suffirit him hes tennentes and servandes to have occupiit the same'.¹⁶⁰ In their decree the rule of law is asserted and the necessity of legal process underlined by the declaration that the pursuer is to enjoy the lands during the term of his lease 'and further quhill that he be lauchfullie callit and ordourlie [put] therefra'.¹⁶¹

The essence of an action for wrongous occupation seems to have been that the possession was wrongful, violent and without title of right. However, though it might seem plausible to imagine that these words were regarded as necessary for the sake of legal form without implying that there was any violence, there is some evidence that the lords required proof of violence for the action to lie. For example, on 5th December 1533, Katherine Watson lost an action she had brought against Beatrice Semple for the profits Katherine should have received had not Beatrice 'maisterfullie and on force...occupiit lauborit and manurit' her lands of Akinbar. The lords assoilzied Beatrice because the pursuers 'have nocht previt the violence conteint in the said sumondis as it is libillit'.¹⁶²

Warrandice

Parties whose title to land was challenged or thrown into doubt would have resort to an action of warrandice, or if the challenge took the form of legal action against them, would call their warrantor to defend the action. An action on 26th March

¹⁶⁰SRO CS 5/41, f.47.

¹⁶¹Ibid.

¹⁶²SRO CS 6/3, f.114.

1530 shows clearly a claim in warrandice being upheld by the lords. John Lockhart of the Bar appeared against Matthew Stewart, earl of Lennox, and his tutor. John wished Matthew to be 'decernit be decrete of the lordis of counsal to warand acquiet and defend' certain lands in Ayrshire, 'to be brukit be him peceablie in tyme tocum eftir the forme of the charter of vendition and alienation thereof maid' by the late John, earl of Lennox. The point of the warrandice claim, however, is revealed in the decree, which states that the earl should defend John in his possession of the land, but also if necessary do so in respect of 'als mekle als gud landis of als greite availe als weile liand and als weile haldin as the said landis'.¹⁶³

Infetment and entry to lands

Where a superior refused to invest a vassal in lands, the vassal had a remedy in an action before council. For example, on 31st May 1531 Duncan McKellar, as heir to the late Thomas McKellar of Barskeet, sued Lord Herries in relation to his lands of Barskeet in the barony of Norton which had been recognosced. They had apparently been granted to John Murehead of Bulleis, but this infetment had been 'laitlie retrexit' by the lords of council. Now Lord Herries was 'enterit to the said haile barony with power to infet their first tennent to thir tennandris of the same'.¹⁶⁴ However, Lord Herries refused to enter Duncan to his land despite being charged to do so within fifteen days. The lords continued the cause so that Lord Herries could 'liquid' the composition for the lands (fix a value of the feudal casualty for entry) 'with certificacione to him and he do nocht the said lordes will decerne and ordains him to entir the said Duncane to the propirtie of the said land, he findaind cautione to do that suld bedone be the law'.¹⁶⁵

¹⁶³SRO CS 5/41, f.38r.

¹⁶⁴SRO CS 5/42, f.184v.

¹⁶⁵*Ibid.*

R.M. Maxtone-Graham has charted the history of the action of showing the holding, and pointed out that by the second half of the sixteenth century such actions were being raised in the session, although originally raised by a lord in his own court.¹⁶⁶ Litigation arising from such actions could also take place before the session, as illustrated by the case of Janet Dickson and her spouse, William Tait, on 22nd April 1534.¹⁶⁷ Janet complained that she held land in chief of James Gladstains, which she had been entered to by James' father, but now James 'hes maid him to lede ane pretendit process agains hir and hir said spous for schawing of thir halding'. Unfortunately, they could not produce an instrument of sasine at the relevant time, although 'thai offerit to preve be the ballie that gave the sesing and uther witnesses that was present thirat that sche gart the same and wes sesit thirin'. This James and his bailies would not allow as evidence and 'dome of propirte' was given. Janet appealed, but James and his bailies refused to give her a copy of the process. The lords therefore ordered that a copy be delivered to Janet by 12th May or else the process itself might be declared null. This illustration shows the extent to which council and session exercised by this time a central, supervisory and effectively supreme jurisdiction over other Scottish courts, since a lord who refused to observe due process of law could find legal process in his own court simply declared void.

Spuilzie

One of the most common actions before the session was spuilzie (dispossession) of goods or livestock. The narration of the ground of action typically followed a common form, as in the summons of George Dalzell against Hew Crawford, called on 17th April 1529. It was for 'wrangous, maisterful and violent spulze...awaytaking

¹⁶⁶R.M. Maxtone Graham, 'Showing the Holding', *Juridical Review* ii (1957), p.267.

¹⁶⁷SRO CS 6/4, f.106v.

and withholding...recently on 15 March of aitis'.¹⁶⁸ If the case was proved, the defender was decreed to have done 'wrang' and the remedy was restitution of the goods: in this case it was ordained that the defender 'sall restor and deliver' the oats. As was generally the case, of course, a spuilzie action did not necessarily reach final decree, and could be abandoned if the defender simply returned the goods in question. On 7th May 1529, for example, Sir James Wychtand discharged his summons of recent spuilzie which was raised against James Wedderburn, because 'the gudis contenit in the said summondis' had been delivered again to him.¹⁶⁹

The action of spuilzie is usually considered to have its origin in canon law and to have developed as a ground of action in summonses before council in the fifteenth century. Neilson and Paton and Hamilton-Grierson have all surveyed the fifteenth-century statutory background,¹⁷⁰ and Professor MacQueen has examined the history of the action.¹⁷¹ However, it is worth pointing out as a refinement that by the 1520s, and probably considerably earlier, the action of spuilzie was competent in the sheriff court. On 28th April 1529, John Spens of Marisoune called John Chalmers and Steven Duddingstone before council. He explained that he had 'optenit ane decret of spulze befor the sheriff of Fiff and his deputis' against John and Steven, but that this had been 'retretit', the retreating taking place 'for the sheriffs unordourlie proceding alanerlie'.¹⁷² On 10th March a messenger had served royal letters upon John Spens allegedly in relation to this decree 'quhilk as he traist is nocht of verite'. Spens wanted the messenger to show him the letters so that he might 'ken the effect thirof', but he refused, and now the defenders had also failed to compear to allow the

¹⁶⁸SRO CS 5/40, f.11r.

¹⁶⁹SRO CS 5/40, f.18v.

¹⁷⁰*A.D.C.* ii, pp. lxxi-lxxii; *Habakkuk Bisset's Rolment of Courtis*, vol. iii, ed. P.J. Hamilton-Grierson (Scottish Text Society, Edinburgh, 1926), p.121.

¹⁷¹*Common Law and Feudal Society*, pp. 224-8.

¹⁷²SRO CS 5/40, f.14v.

letters to be examined.¹⁷³ Thus we see council exercising its supervisory jurisdiction in relation to matters which had already been the subject of a preliminary legal action in the sheriff court.

It is not always clear exactly what the elements of a spuilzie action were. For example, on 14th May 1529 there were submissions in which it was attempted to draw a distinction between spuilzie and 'wrang'. James Foulis, *forspekar* for the lairds of Burleigh, protested that if process were led against the laird 'bot apoun spulze that thai suld nocht proceid apoun the wrang and gif thai did for nullitie of the process, becaus be the privilege of the summondis thai may nocht proceide but be way of spulze'.¹⁷⁴ The pursuer, Thomas Scott, referred to 'his summondis of spulze and wrang',¹⁷⁵ but the laird of Burleigh 'allegit the summondis was libillit for spulze and nocht for wrang'.¹⁷⁶ However, the lords had already given their sentence interlocutor that they could proceed because the summons was for 'wrangwis spoliatioune'.¹⁷⁷ The explanation for these submissions may be that the wording of the summons did not explicitly allege 'wrang' but only spuilzie, and had therefore been drafted inadequately for the action intended. However, it is hard to see how the lords could determine spuilzie without determining 'wrang', since spuilzie was by definition wrongful.

Certainly by the 1520s, one element in a spuilzie action could be the allegation of having been spuilzied of the possession of property, as distinct from wrongous occupation or ejection, and this does not seem to have been a feature of spuilzie actions in the records up to 1506. For example, on 14th May 1529 James

¹⁷³Ibid.

¹⁷⁴SRO CS 5/40, f.33v.

¹⁷⁵SRO CS 5/40, f.34.

¹⁷⁶SRO CS 5/40, f.34v.

¹⁷⁷SRO CS 5/40, f.33v.

Crichton of Cranston Riddale appeared in order to pursue his summons against Katherine Rutherford, Lady of Traquair, for the 'wrangwis and maisterful recent spulzie of him of his iust possessioun of his steding and land of Schotingleyis' and 'putting and halding of livestock apoun the same recently in May 1527'.¹⁷⁸ The lords went on to decree that Katherine had done wrong.

Sometimes, of course, a spuilzie action might be brought when the seizure of goods in question was lawful and carried out, for instance, in the execution of diligence. An illustration of such an action came on 1st February 1530/31 when John Nesbit of Newton renounced his summons of spuilzie against William Hay because he 'grantit that the gudes takin fra him be the kinge officiar war lauchfullie apprisit to the said William and utheris eftir the form and tenor of the said Johnes bond maid to him'.¹⁷⁹

In terms of the scope of a spuilzie action, we have seen that an abstract right such as possession could be spuilzied, and a further such example is the spuilzie of jurisdiction. An action was heard on 6th February 1530/31 in which the provost and bailies of Edinburgh and Alexander Little, a burgess of Edinburgh, sued George Forester, an inhabitant of Leith, for recent spuilzie on 14th June 1530. He was alleged to have spuilzied goods from the shore of Leith and thereby also to have committed 'wrangwis spulze of said provost, baillies, counsel of thir possession and jurisdiction of arresting halding of courte and attachement making apoun thir said shore be hes pretendit coulorit aresting thirupon as bailz of Leith', contrary to their 'auld infetment', a charter by the laird of Restalrig to the town of Edinburgh. The lords upheld the claim in full.¹⁸⁰

¹⁷⁸SRO CS 5/40, f.37r.

¹⁷⁹SRO CS 5/42, f.30.

¹⁸⁰SRO CS 5/42, f.35.

This example is not unique. On 31st March 1531 Andrew Murray of Blackbarony complained against Robert Borthwick 'ffor the wrangwis using and excerting of the said Androis office of bailzerie perteining to him in few ferme and heretage of the tone and lande of ballincreif...and wrangwis haldin of bailzie courte thereon without tak or licence of the said Andro'.¹⁸¹ This was despite the king's inhibition, and so Andrew had suffered the 'wrangwis spoliatioun of him of hes possession of the said office' and the lords duly declared Robert to have done 'wrang'. Here we see jurisdiction treated simply as a property right, possession of which could be spuizied, and therefore fall to be restored according to Andrew's infetment.

As has been noted, the remedy for spuizie was restoration of the goods concerned. Disputes could arise over whether or not such goods had been restored, and it could be a defence to a spuizie action that this was the case. For example, on 23rd March 1530/31 the lords made a ruling on an exception put forward by Ninian Chirnside of East Nesbit 'to preve that he restorit and deliverit 8 kyn and hors of the 52 kyn and 4 hors aboune written'. The lords assoilzied Ninian in respect of these seven 'kyn' and a horse 'because the said Ninian hes maid payment thereof'.¹⁸²

¹⁸¹SRO CS 5/42, f.159v.

¹⁸²SRO CS 5/42, f. 144.

(iv) Other substantive actions and grounds of action

Feudal casualties

Casualties such as non-entry, ward and marriage were frequently the subject of litigation, not least because they were assignable and carried with them rights over property with potentially great commercial value.

That casualties could be assigned gave them an obvious commercial utility. This is apparent in an action before the lords of council raised by Nichol Cairncross, who compeared on 22nd May 1529 to explain how he had 'maid finance' to William Hamilton, who had 'passand in France', of the sum of 1400 merks 'for the quhilk the said Williame maid him assignay to the ward and marriage of Houstone'. He was now concerned that his position should not be prejudiced by anything which could alter relations between William and the laird of Houston. His appearance in court was simply to note his interest and thereby secure his position to pursue an action as he saw fit.¹⁸³

Casualties such as ward were pursued not only in connection with profits arising from land: physical possession of the heirs was pursued as well, in order to have control in relation to any marriage which might be arranged. For example, on 28th July 1529, Sir James Sandilands of Calder appeared to claim the 'keping' of the daughters of the late Margaret Ramsay, since they would hold lands of him by service of ward and relief. However, their father, Edward Sinclair, was refusing to give them up. The lords ordered him to deliver the heirs specifically so that James 'may dispone apoun thir marriage'.¹⁸⁴

¹⁸³SRO CS 5/40, f. 24.

¹⁸⁴SRO CS 5/40, f. 71.

The heir to lands which were held in ward could look to the council to protect his interests. For example, on 31st March 1531, Lord Crichton of Sanquhar complained that 'his lande and heritage hes bene of lang tyme bigane in ward and hes na blanchferme lande to susteine him and the wardoure of the said landes and heritage will geif him na part thirof to his sustentacioun'.¹⁸⁵ This was an action known as one 'to modify thirby ane competent leving thirof' to the 'sustenatioun' of the heir. On this occasion Lord Crichton produced retours of the cognition of the value and extent of his heritage made in 1530 by the sheriffs of Dumfries and Perth. The lords went on to set a 'resonable leving' of £20 per annum up to the age of ten; 40 merks per annum up to the age of sixteen; and 100 merks per annum between the ages of sixteen and twenty-one, 'quharthrow he ma be honestlie susteint in his less age according to equities', the total rental from his lands being 967 merks per annum.

Actions of non-entry were very important, since as a result of lands having fallen into non-entry through the failure of the heirs to receive investiture, apprising could follow and the whole property be judicially disposed to the king or whoever was the superior, or a chosen assignee. For example, on 30th March 1530, the king and David Bonar, his donator, pursued the earl of Buchan and others for the non-entries of land in Forfarshire, the defenders being the 'herituris' of the land. The king sought declarator of non-entry over a fifty-year period, and 'the ground of the said lande to be apprisit for the same' in respect of mails and duties. In this case the defenders were assoilzied after the production of a gift of the non-entries in question by James IV to James Beaton, by then archbishop of St. Andrews.¹⁸⁶

¹⁸⁵SRO CS 5/42, f.161.

¹⁸⁶SRO CS 5/41, f.51.

Interdict from alienation of property

Interdict by creditor

The modern procedure of inhibition is found in the form of an interdict against alienating property, and commonly this form of letters is taken out by a creditor. It was not necessary to come before council to obtain the grant of such letters, but it was council which exercised a supervisory jurisdiction over such matters through its authority to suspend royal writs. On 6th April 1529, for example, Alexander Scott, parson of Middleby, supplicated council to suspend such letters taken out by a burgess of Edinburgh, Rolland Donaldson, who alleged himself to be Alexander's creditor. The basis of the interdict from Rolland's point of view was that Alexander was 'awand to him grete soumes of money and is not responsale [capable of accounting for security to pay the debt] thirfor in movable gudis', but Alexander alleged that in fact Rolland owed more than £100 to him. The effects of Rolland's action had been severe: Alexander found himself charged by 'opin proclamacioun' at the mercat cross of Edinburgh not to sell or 'analie' any of his lands or heritage 'in fraud' of Rolland, and there was a general charge to the lieges not to buy or take in wadset any of Alexander's lands, and 'gif ony deis in the contrare the same salbe of nane avale'.¹⁸⁷ Rolland failed to compear, and Alexander received his remedy of suspension of the letters 'ay and quhill thai be producit'. They were in fact produced ten days later and declared to be 'ordourly procedit'.¹⁸⁸

¹⁸⁷SRO CS 5/40, f.8.

¹⁸⁸SRO CS 5/40, f.10.

Interdict in relation to a marriage settlement

Such an interdict could similarly be employed in relation to a marriage settlement, to guarantee to one of the contracting families that the other family would not diminish the likely inheritance to be expected from its property by alienation. For example, on 17th April 1529 Andrew Reidpath of Grenlaw appeared before council by way of supplication to state his desire that 'of his fre motive' he be interdicted by the lords' authority 'fra all selling, wedsetting and alienatioune' of his lands, annual rents and heritage. This was in connection with the 'fulfilling of ane contract of marriage betwix him and Steven Brounefeild of Grenlawdene anent the contracting of matrimone betwix his son and the said Stevins dochter and for conservatioune of his hous and heritage and in favouris of his airis'.¹⁸⁹

Interdict of minors

For his own protection a minor might supplicate the lords to interdict him from alienating property. On 11th May 1529 Walter Borthwick explained to the lords that he was 'ane child of 18 or 19 yeiris of age' and intended to travel to France to 'leire the use of merchandice'. Because 'thir has bene divers young men maid contractis and has bene seducit to sell thir landis and heretage in tymis bigane, thai beand in ferr partis fra thair frenndis and dreide to be siclik seducit to inconementis'.¹⁹⁰

Loosing of interdict

A party under interdict against alienating property would require to compear again before the lords if it was desired to alienate any of the property interdicted. The

¹⁸⁹SRO CS 5/40, f.12.

¹⁹⁰SRO CS 5/40, f.22.

lords seem to have had a discretion in making such a decision, since their consent is usually expressed in the form that they 'thocht resonable' the request, and if the interdict was made at the instance of a third party then his consent might be required as well. For example, on 24th January 1530/31 Lord Lyle compeared to supplicate for the loosing of such an interdict. The circumstances were that before the interdict had been made, 'part of the saide lande quhilk is verray proffitable wes wadsett' and now Lord Lyle wished to redeem it. However, in order to do this he needed to alienate some other land in Renfrewshire which was less profitable than the wadsetted land. The lords 'lowsis the interdict' for this specific request, and it is clearly stated that the grounds upon which they deemed the loosing reasonable were that 'the same is for his [Lord Lyle's] utilite and mair profett'.¹⁹¹ Further proceedings two days later illustrate the procedure by which the transaction would be allowed. The lords 'interponit and interponis thir auctorite with decret irritant thereupon' and ordain royal letters to be sent to the sheriffs of 'the shyris quhar any of his saide lande lyis' and for publication of the revised interdict at the market cross of the head burghs of these shires. This particular set of proceedings is not just personal to Lord Lyle but binds all the king's 'lieges'.¹⁹²

Modification of assythment

The lords had a jurisdiction to 'modify' or set the exact terms of an assythment, which legal action was presumably necessary if a party did not voluntarily offer assythment. Professor Robert Black has described with reference to a slightly later period how 'the *quantum* of compensation might be remitted from the Justiciary Court to the Court of Exchequer. In time, the whole action of assythment came to be

¹⁹¹SRO CS 5/42, f.5.

¹⁹²SRO CS 5/42, f.10.

competent also in the Court of session'.¹⁹³ Evidently, though, by the reign of James V it would seem that the whole action was already competent in the session, albeit following upon proceedings in justice ayres.

For example, on 28th July 1531 Gelis Guthrie, relict of David Garden of Braktullo and others, sued James Rynde of Cass as pledge and surety for Lord Ogilvy, who had been indicted in the last justice ayre of Dundee for art and part of the slaughter of David Garden, and had been granted a respite for this act. Now Gelis wants 'ane competent assithment to be modifyit' by the lords, who decree for 'assithment to be maid...in maner form and effect as eftir followis modifyit be the saide lordis avisesly'.¹⁹⁴ Obligations are laid down for prayers to be said, a pilgrimage to be undertaken, the public asking of forgiveness, the payment of compensation and the issue of letters of slains.

Payment of mails

A familiar process in the session was a summons for payment of mails, duties and profits of lands from a defender who had been receiving payment without right. For example, on 24th March 1529/30, William Hamilton of Macknairston appeared against Adam Wallace of the Newton and William Wallace, tutor of Craigie, in such an action. Adam had been 'accusit' in the last justice ayre of Ayr of the 'reif and oppressions', spuillzie and 'violent occupation, labouring' of the lands in question. William's title was an assignation and disposition from John, Lord Lindsay, as heir and executor to the late Patrick, Lord Lindsay. The lords duly decreed that Adam

¹⁹³A historical survey of delictual liability in Scotland for personal injuries and death', *The Comparative and International Law Journal of Southern Africa* viii (1975), p.59.

¹⁹⁴SRO CS 5/43, f.21v.

was to pay four years' worth of mails and profits. With that action resolved, the parties went on to submit the underlying question of ground right to arbiters.¹⁹⁵

When the parties laid claim to the mails of land to which they both alleged themselves to have title, an action might be raised by the tenants of the land to prevent their being exposed to 'double poynding'. On 26th March 1530, for example, the 'pur tennentes' of Balquhiddel had their action called against the earl of Rothes and Lady Glamis. The earl claimed to have from the king the gift of the ward of the lands since the death of Lord Glamis, whilst Lady Glamis claimed part of the lands by reason of terce. The point of the action was that the defenders were 'to produce and schew before the saidis lordis sic rycht as ilkane of thame will use for the double poynding', and calling them to the session would force them to do so. In this case, the earl claimed that the late Lord Glamis had already granted out these lands to a third party in liferent, and so they should fall to be included in the ward lands, and he was ordered to prove this at a hearing a few days later. However, the tenants received an interim remedy as well, since the lords 'als ordanis the gudes now poyndit pertening to the said pur tennantes be relizit and deliverit to thame agane to remaine with thame ayand quhill it be decidit to quham thai suld pay thir mailis and deweties'.¹⁹⁶

Enforcement of bond

A straightforward action before the session was the enforcing of a contract or bond between two parties. For example, on 18th June 1532 Patrick Strageth sued Lord Drummond and his tutor, seeking a charge from the lords that Drummond should resign into the king's hands lands in the stewartries of Menteith and Strathern and

¹⁹⁵SRO CS 5/41, f.37.

¹⁹⁶SRO CS 5/41, f.38.

sheriffdom of Perth, so that they could be given to Patrick as heir to his brother, in excambion (exchange) for the land of Strageth, or else to infest Patrick in the land directly as successor, to be held of the king under confirmation. The ground of the action was that the late Lord Drummond 'bound and oblist him and hes airis to the said umquhile Johne Strogeith [brother of Patrick] and airis to do the same'.¹⁹⁷ The lords issued letters to this effect after examining the 'letters obligaturis' and bond.

Assignment

Occasionally, the recorded decision of the lords contains sufficient reasoning to illuminate some legal rule or other. A case of 22nd May 1529 turned on the law of assignation, for example, even though the nature of the rights in question - the casualties of ward and marriage - was feudal. A dispute had arisen over the right to these casualties in respect of the heirs of Inverugie, the king having made consecutive gifts of the same to the earl of Errol and, after his death, the earl Marischal. The countess of Bothwell, Lord Maxwell, the earl Marischal, the earl of Errol and John Hay, provost of Guthrie, had all been summoned by the king to 'produce and schaw quhat ryt our souveraine lord or thai has'. The late earl of Errol, it transpired, had made 'divers pretendit assignations' of the casualties gifted to him, but these were 'fenzeit and of nane avale because thai war maid *inter vivos* and thir followit na possessioun of the said assignatiounis but the said umquhile William earl of Erole remanit in possessioun of the said ward and mariage...quhill his deceis'. It is not clear whether 'possessioun of the said assignatiounis' meant narrowly the delivery of the deed of assignation, or more broadly the collection of the dues which pertained to the assignee as a result of the assignation. However, the assignations in this case were ineffective and the casualties 'returnit again to our

¹⁹⁷SRO CS 6/1, f.26.

soveraine lord' to dispone again as he pleased.¹⁹⁸ Possession in this context may well have been possession in the broader sense and not just delivery of a deed. This is suggested by another entry in the same case where a procurator protested that there had been possession 'be holding of courtis'.¹⁹⁹

Sale of goods

Disputes over the ownership of goods or livestock in connection with sale can be found before the lords, even for a matter such as a single horse. It says something for the availability of central royal justice that the owner of a horse should consider it feasible to to supplicate the lords of council for a remedy in such a matter. On 2nd June 1529, for example, John Chalmer gave in a supplication against John Barns alleging that he lent his horse to James Bassenden, a burgess of Edinburgh, to travel from Dunbar to Edinburgh, but that 'be the gait he and the said hors war takin be Gawyn Hume' and others, servants to Archibald Douglas, formerly earl of Angus. Now Bassenden had found the horse again, and wished delivery of it. Barns alleged that he 'coft' the horse from William Charteris, servant to Lord Bothwell, who he now called in warrandice. The matter is meanwhile continued.²⁰⁰

Caution, surety and lawburrows

It has been shown how agreements for caution could be registered before the lords, and cautioners constituted as such through a formal appearance before the session. The lords also dealt with complaints that such agreements had been broken, for instance in the case of lawburrows. On 6th April 1531, for example, Robert

¹⁹⁸SRO CS 5/40, f.26v.

¹⁹⁹SRO CS 5/40, f.28v.

²⁰⁰SRO CS 5/40, f.50.

Adamson, a burgess of Edinburgh, and his spouse appeared to pursue an action against John Sinclair on the basis that he had 'found suretie and lawbarowis' that Robert and his wife should be unharmed, but that this had been broken since they had been 'invaudit and struke'. They wanted new lawburrows to be found, but the lords continued the action for proof of the breaking.²⁰¹

Executry

Occasionally, problems relating to executries were brought before the lords by a supplication. For example, on 14th May 1529 Christine Anderson, the relict of Alexander Adamson, a burgess of Edinburgh, complained that after Alexander's recent death his friends had entered his house and 'intromittit and tuk up all hir gudis and keyis of hir kistis...and has lokkit the same in ane grete kist sa that sche may nocht gett hir clething, schetis, blancaitis and uther necessaris as uther wifis has and suld have of resoun'.²⁰² The lords ordered Christine to remain with the house and goods 'quhill the testament be confermit and equalie distributioun of the gudis be maid, sche fundand sufficient cautioune that the saidis gudis salbe furth cumand to Alexander's executors'.²⁰³ The example also offers an incidental insight into the practicalities of confirmation and executry procedure.

Ecclesiastical affairs

Occasionally, disputes which seem to have no civil law implication are brought by churchmen before the session. For example, on 31st January 1530/31, the archbishop of St. Andrews, James Beaton, supplicated council to forbid the abbot of

²⁰¹SRO CS 5/41, f.69v.

²⁰²SRO CS 5/40, f.37.

²⁰³Ibid.

Glenluce from carrying out a visitation of Cistercian abbeys in Scotland. The abbot had apparently received a commission from Cîteaux to undertake this visitation, but the archbishop alleged that he had the right to carry out visitations of nunneries within the diocese of St. Andrews. The lords agreed to this, until such time as Glenluce should compear and prove the terms of his right, accepting that 'it is notourly knawin to all the said lordes' that this was an 'auld privilege' of the archbishop of St. Andrews.²⁰⁴

Litigation over property rights affecting revenues such as those from teinds seem also to have been within the jurisdiction of the session. However, the scope of such litigation appears to have been limited to what would now be called execution of diligence. Jurisdiction to decide upon the right to teind sheaves seems to have belonged to the church courts. This is implied in a decision on 7th June 1531, following letters of the archbishop of St. Andrews against Sir William Hamilton, executor of Robert Forman, dean of Glasgow. William alleged that the executry estate included an assedation of certain teind sheaves, and had taken out letters charging the archbishop and Hew Spens, as judge delegate, to cease proceeding against William for reduction of this assedation. However, the lords suspended these letters, stating that 'thai ar past without cognition in the caus...and als becaus the said mater concernis teyndis quhilk suld haif process...befor the spirituale juge and nocht in temporale court'.²⁰⁵

However, further proceedings on 28th July 1531 show that the official had been charged by the lords of council to send to them 'the autentik copy of the libell' in question, for them to consider 'gif the same be intentit be vertu of the bull callit bulla paulina'. Having considered the libel, they find it too 'generale' and 'can nocht

²⁰⁴SRO CS 5/42, f.24v.

²⁰⁵SRO CS 5/42, f.185v.

clearlie understand be quhat law the said Juge intend to proceid in the said mater'. Correspondingly, the lords ordain the official not to proceed on this libel, and instruct the pursuer to 'found ane new libell and to specify clerelie therein apoun quhat law and caus it beis foundat' so that the lords may consider whether or not the action is proceeding 'super bulla paulina'.²⁰⁶ So to that extent it would seem that the question of jurisdiction depended upon the legal basis of the claim rather than the subject matter itself.²⁰⁷

Parties might also complain to the lords that a civil action was being wrongly pursued in the church courts. On 20th July 1531, for example, Lord Lindsay complained that land he had redeemed ten years earlier was subject to a claim of terce from a widow, who had subsequently assigned her terce rights to a chaplain, John Balfour, who 'callis and trublis the said lord' before the official of St. Andrews. Lord Lindsay alleged that the action was 'civile and prophane concerning the said Johne Lord Lindesay's heretage and the said officiale na competent juge thirto'.²⁰⁸ Thus he demands that the official send to the lords of council 'the autentik copy of the libell gevin in before him' to see whether it is civil in nature. The lords upheld the complaint and barred the official from further proceeding. If, however, such a case was not 'prophane', then the lords might do the opposite and remit the action to the church courts, as they did on 27th January 1533/34, in a case involving Hugh Farny and Thomas Meldrum, the former having complained that the commissar general of the official principal of St. Andrews was not a competent judge.²⁰⁹

²⁰⁶SRO CS 5/43, f.23v.

²⁰⁷*Bulla Paulina* of 1468 for restraint of alienation: *Acts of the Lords of Council in Public Affairs 1501-1554*, ed. R.K. Hannay (Edinburgh, 1932), p. lvii.

²⁰⁸SRO CS 5/43, f.13.

²⁰⁹SRO CS 6/3, f. 181.

Presentation to ecclesiastical chaplaincies was essentially the conferral of a property right, and as such the lords could entertain related legal actions. For example, on 3rd June 1532 Andrew Kirkcaldy sued Sir Walter Ninian because Ninian had been collated to the chaplaincy by the archbishop of St. Andrews as 'ordinary' of the diocese. However, Kirkcaldy had been presented to it himself by William Williamson, 'undoutit patronne of the rude alter within the parish kirk of kirkaldy', and the archbishop refused to 'gif him collation'.²¹⁰ Ninian was trying to take possession of the chaplaincy but Kirkcaldy complained that he had appealed in due time. The lords granted a two week continuation and ordained Kirkcaldy to produce 'the foundation of the said alterage' so that the rights in it may be proved.

Custom

Occasionally, there is reference to custom in the decisions of the lords, not as in the 'practick' of the court, but rather what appears to be local custom which, if proved, is recognised by the lords as providing the rules by which a legal question may be determined. For example, on 5th July 1533 the lords heard the summons of Beatrice Semple, a widow. She was ordained to summon witnesses 'to preif that the auld rite use and consuetude is that women eftir thir husbandis deceis haifand any feld landis or akeris within the fredome of the burgh of Dunbertane broikit josis and occupys thir tercis of the saidis landis and swa has bene usit observit and keptit thir 40 yeiris bipast or thirby be consuetude of the said ton'.²¹¹ The point was that 'na burrowland in this realm gevis ony tercis thirof ' as was explicitly argued in further proceedings on 31st July.²¹² The 'use rite and consuetude' of Dumbarton would therefore be an exception to the general rule at common law, if it could be proved that this was

²¹⁰SRO CS 6/1, f. 10.

²¹¹SRO CS 6/2, f. 225v.

²¹²SRO CS 6/3, f. 48r.

indeed the use. In fact, although Beatrice therefore had an arguable case, she failed to prove it and so the lords assoilzied the other parties 'for all that thai have yet sene'.²¹³

Effectiveness of legal remedies

Despite the pervasive influence of legal process throughout the ordering and government of Scottish society, the provision of legal remedies can sometimes be seen to have little effect. The lords of council could be on occasion a body through which complaints reflecting this were made directly to the king. On 10th May 1529, for example, John Multrare of Seafeld compeared and 'exponit how the lard of Raith had oftymis invaidit him and his son for thir lifis and distructione of thame and had inlikwis rest and spulzeit his cornys apoun the quhilk he had optenit decretis'. Despite this Raith had 'sett apoun him in Kirkaldy...and upon forthocht felony slew twa honest gentilmen for the quhilk the said lard of Raith was now present in the castell beand summond to undirlic the law for the said crimes'. Multrare came now 'besekand the lordis that thai wald solist the kingis grace to caus him have iustice sen he is sa evill done to'.²¹⁴

Conclusion

The purpose of this chapter was not to enter into any particular historiographical debate, but rather to draw a picture showing the variety of judicial business transacted by the session. Such a picture is revealing in its own right but also

²¹³Ibid.

²¹⁴SRO CS 5/40, f. 21.

provides the necessary context for the discussion elsewhere in this thesis of particular aspects of that business.

The most striking conclusion to be drawn from the survey attempted in this chapter is based upon the sheer range of the jurisdiction which the lords exercised, combined with an apparently unlimited authority to overrule all other civil courts, nullify their decrees, order new process to be undertaken, and transfer actions to be heard by themselves. In its exercise of the remedies of suspension, reduction and advocacy in particular, the session commanded a supreme position amongst civil courts in Scotland, and used its procedural powers of intervention to interfere with any civil legal process upon cause shown, effectively supervising the administration of justice in Scotland as well as entertaining the broadest possible range of complaints at first instance.²¹⁵ Dr. Athol Murray's observation for the 1540s, that 'this was indeed a supreme court', can justifiably be applied to the late 1520s and 1530s as well.²¹⁶

Examination of the question of the jurisdiction of the session over fee and heritage elsewhere in this thesis has led to the conclusion that the earlier limitation in this respect was no longer recognised by the late 1520s, if not earlier. The broader context of litigation conducted before the session provides some support for this particular conclusion, since so many actions relating to rights in property were heard by the session. Any jurisdictional limitation on the competence of the session to decide questions of fee and heritage would have stood out as exceptional, both in relation to its general jurisdiction over property and its superior jurisdiction over

²¹⁵Professor MacQueen discusses advocacy in *Common Law and Feudal Society*, p. 240, and suggests reasons why it was attractive to litigants.

²¹⁶'Sinclair's Practicks', p.98.

other courts, and would surely have received explicit enunciation in the record if it were recognised any longer.

Professor Peter Stein has observed, in relation to the evolution of national courts manned by professional judges by the early sixteenth century, that 'the judges and advocates who appeared before these national courts realised that each court had its own practice, which, as in England, constituted a forensic custom or *usus fori*'.²¹⁷ By the 1530s the session had evolved so that it had a 'practick' of which its judges and advocates were well aware, and which was recorded by members of the bench informally from 1540 onwards, if not earlier.²¹⁸ We have seen, though, that the jurisdiction of the session appears to have been very fully extended by the late 1520s. Therefore, if there was any change that was likely to have generated this judicial and institutional self-consciousness, it was most likely to have been the foundation of the college of justice. In the next chapter it will be argued that this development did bring into effect significant changes in the nature of the court. Although in its 'practick' the session seems already to have been a supreme central court by 1532, its reconstitution as the college of justice, in addition to instigating these changes, seems to have stimulated its recognition by contemporaries as exercising that role. The best illustration of the process of recognition is the example cited by Dr. Murray from 1544, in the submission that 'the lordis of counsall were also judge ordinaris to all civill actioun within the realme be the first institutioun of the college of justice maid be the king and the thre estatiss in parliament'.²¹⁹

²¹⁷'Common Law and Civil Law in historical perspective', *Zeitschrift für Europäisches Privatrecht* V (1997), p.390.

²¹⁸'Sinclair's Practicks', p.91.

²¹⁹*Ibid.*, p.98.

Chapter Six

The Foundation of the College of Justice in 1532

Introduction

The orthodox view of 1532, typical of modern historiography, was stated most pithily in Professor Duncan's essay, where he wrote that 'it is clear that the creation of the college of justice was no more than an excuse to mulct the Church'.¹ The only difference he was prepared to recognise in the new institution was a greater degree of permanence: 'the "new" court was but the old session in more permanent form'.² Other scholars have departed from Duncan's view to argue that at least the consequences following the foundation were significant, especially in the apparent assumption of a full civil jurisdiction by the court.³ However, Duncan's assertion that the foundation of the college was no more than an excuse to tax the church has not been seriously challenged. Since Duncan's article was published in 1958, it has become a seminal work on the subject, and has been highly influential. It appears to be largely based upon the work of R.K. Hannay, who had been concerned to show the evolution of the session before 1532. The kind of tradition which Hannay reacted against is exemplified by Bishop Keith's *History of the Affairs of Church and State in Scotland*, where Keith remarked that because James V 'observed that his

¹A.A.M. Duncan, 'The Central Courts before 1532' in *Introduction to Scottish Legal History* (Edinburgh, Stair Society, 1958), p.336.

²Ibid.

³A.L. Murray, 'Sinclair's Practicks', in *Law Making and Law Makers in British History*, ed. Alan Harding (Royal Historical Society, 1980), pp.90-104; H.L. MacQueen, 'Jurisdiction in Heritage and the lords of council and session after 1532', in *Miscellany II*, ed. W.D.H. Sellar (Stair Society, Edinburgh, 1984), pp.61-85; W.D.H. Sellar, 'The Common Law of Scotland and the Common Law of England', in *The British Isles 1100-1500*, ed. R.R. Davies (Edinburgh, 1988), pp.83-99.

subjects were at a great loss for want of a settled Court of Justice, managed by Judges learned in the law, he first instituted in Scotland the COURT OF SESSION or COLLEGE OF JUSTICE, consisting of fifteen Judges, to remain fixed in a certain place, as it subsists to this day. *And long may it do so!*⁴ However, whilst Keith's view would be untenable in the light of Hannay's work, the work of Hannay and Duncan is also now open to revision.

Institutional developments in the 1520s and early 1530s

The foundation of the college of justice in 1532 is often assessed in isolation from the general development of the session over the preceding years. However, if it is placed in the context of that development, it is possible to recognise it as bringing about coherent reforms which built upon and extended measures which had already been attempted or adumbrated in previous ordinances. The vehicle for these reforms was nothing less than a new institutional framework, as realised by the incorporation of the college of justice.

Before examining the foundation of the college of justice itself, therefore, the three reforming ordinances of 1526, 1527 and 1531 will be surveyed. It will be seen that they were designed to select particular lords of council to act as judges on the session, and to exclude those lords who did not receive this specific commission. There is a direct continuity with the college of justice, since the main institutional change brought about by its foundation was restriction of the right of attendance to a small and exclusive body of lords of session, to whose number admission had to be

⁴Robert Keith, *The History of the Affairs of Church and State from the beginning of the Reformation...to 1568*, eds. J.P. Lawson and C.J. Lyon (3 vols., Spottiswoode Society, Edinburgh, 1844-50), vol. i, p.57.

made by specific commission from the king, and in time required the consent of the lords themselves.

The Two Ordinances of 1527

An ordinance in February 1526/27 shows the session reinforcing itself with some specialist lords, who were urged to 'sitt continuale apoun the sessioun'.⁵ However, it was only in 1527 that detailed rules were made which reflect a move to regulate the session more firmly. This regulation was in a sense the first important structural change to the institution of the session since 1503, and served to enhance its identity as distinct from council generally.

An ordinance of 13th March 1526/27⁶ named individually all those entitled to sit as judges on the session, which was to be conducted 'be the lordis and otheris personis of his [i.e. the king's] consell undirwritin'. The implication is that only those 'undirwritin' may sit. Provision is made for a president, with two alternatives named in case of absence. Then the thirty lords eligible to sit are listed, first the 'spiritualite', second the 'temporalite'. The exclusive nature of the list is emphasised by the extension of membership in a separate clause to James Beaton, archbishop of St. Andrews, Gavin Dunbar, bishop of Aberdeen, and Colin, earl of Argyll. In other words, had these three not been named, the implication is that they would not have been able to sit.

The actual sederunts of the session show that average attendance was much smaller than the maximum would have permitted, often less than fifteen, except for

⁵*Acts of the Lords of Council in Public Affairs 1501-1554* ed. R.K. Hannay (Edinburgh, 1932), p.238 [hereafter *A.D.C.P.*].

⁶*Ibid.*, p.256.

the last couple of months of 1527.⁷ In the sederunts of this year Dr. Emond has identified a core of what he terms virtually professional administrators acting as judges, including Adam Otterburn, the king's advocate; Nichol Crawford, the justice clerk; Archibald Douglas of Kilspindie, the treasurer; Sir William Scott of Balwearie; and John Dingwall, provost of the collegiate church of Holy Trinity. Apart from Douglas, the other four were to be judges in the college of justice at its foundation.⁸ Dr Emond observed that 'the traditional rights of all lords to come to the council and act as judges had been eroded by successive attempts to define who were to be the judges on the session'.⁹ It is hard, however, to discern any significant erosion of this nature before 1527.

The other important ordinance referred to is undated.¹⁰ Hannay placed it in 1528 in his study 'On the Antecedents of the College of Justice',¹¹ although Thomas Thomson placed it in 1527. Hannay seems to have become less sure of himself, however, and printed it in 1527 in *The Acts of the Lords of Council in Public Affairs*, published ten years after his earlier article. Here it is assumed to have been of December 1527.

The first article of this ordinance is highly significant, since it makes an explicit prohibition of any lords, other than those named by the king, sitting on the session: 'in the first ye sall gar writ in a table with greit lettiris the namis of tham that we subscrivit to be on the cession, charging tham to await tharapon and at all othiris lordis and othiris men knaw thaim selffe and ingeir tham nocht to the thing at tha ar nocht chosyne to, and affix this table on the conselhous dor to be seyn with

⁷W.K. Emond, 'The Minority of King James V' (St. Andrews Ph.D., 1988) p.549.

⁸Ibid.

⁹Ibid., p. 549 and n.155, p.569.

¹⁰*A.D.C.P.*, p.272.

¹¹R.K. Hannay, 'On the Antecedents of the College of Justice', *The Book of the Old Edinburgh Club* XI (1922), pp.87-123, at p.115.

eviry man at cummis tharto'. That explicit royal permission was formally required now before somebody could sit on the session is demonstrated by the fact that fifteen months later, in March 1528/29, James Colville of Uchiltre had to produce 'ane writing subscrivit by the kingis hienes desirand the lordis to admitt the said James to be ane of the sessioun, chekkir, generale counsale, and all uthiris tymis as accordis', in order to be admitted by the other lords of council and session; we are told that the lords admitted him because it was 'thocht resonable' by them.¹²

The years 1524-27 had seen the session meeting in a more regular way, now that the political instability of the minority was reduced. However, it also appears that the pressure of business was as high as ever. The ordinances of 1527 seem in part to represent attempts to re-articulate in some detail the proper form of proceeding in session, and the ending of some particular abuses. However, they went further than this because they specified exactly the personnel of the session, and denied entry to those who were not included. All the same, the list of lords which comprised those who were to sit on the session was not itself a list of the session judges so much as of lords of council from whom the session judges would be drawn on a daily basis, and, of course, the sederunts were smaller than the total number available. There was evidently also a core of men who had professional experience as lawyers and judges. In going further, these ordinances seem to represent an attempt to insulate the work of the session from political pressures and interference, to streamline its procedure and to arrange for there to always be an adequate sederunt for it to proceed. However, session was still seen as a function of council, even if some of the expedients and practices adopted tended to separate it off in certain ways and entrench certain distinctions between them in terms of institutional identity. It is likely also that judges on the session were developing a

¹²*A.D.C.P.*, pp. 306-7.

self-conscious sense of identity by 1527, Hannay commenting more generally that since 1513, 'the lords of council, acting as representative of the prevailing political faction at a time when the authority of the crown was intermittent or feeble, developed a strong sense of their importance in administration...of which the admittance of Colville to the bench is an example'.¹³

By 1527, formal change in the organisation of the session had occurred in terms of personnel, and the next five years saw further developments. The period 1513-27 saw as great a flow of judicial business to council and session as ever before. Innovations in organisation, just as before 1513, were designed to contain and process this business. It may be significant, too, that it was after 1527 that decisive changes came about, because since the summer of 1526 James V had started to show an independence of will,¹⁴ for example asserting himself by executing a bond to the earl of Lennox, a leading opponent of his chancellor, the earl of Angus, at the end of June 1526,¹⁵ and by June/July 1528 being in control of government. Whether or not James displayed personal interest in the functioning of the session, his personal rule brought to the heart of government men who did, such as Gavin Dunbar, archbishop of Glasgow, nominated as president of the session in March 1526/27¹⁶, and chancellor in 1528.

The Ordinance of February 1530/31

For the first time since 1527 there was now a major ordinance regulating the session, repeating many of the previous rules but also incorporating new detail.¹⁷ The new

¹³Ibid., p.117.

¹⁴Emond, *op.cit.*, p.486.

¹⁵Ibid., p.504.

¹⁶*A.D.C.P.*, p.256.

¹⁷Ibid., p.349.

ordinance specifically concerned the 'ordouring of the sessioun and lordis that suld have voit tharin'.¹⁸

From the text of this ordinance it is clear that up until this time lords of council were coming to sit on the session whether or not they had been nominated to do so, using their votes in the making of decisions, causing confusion, preventing justice being done and undermining the keeping of order in proceedings. It is made clear that only those lords who were named were 'to have voit in the sessioun and in decision of all materis that concernis tharto, and nane utheris'.¹⁹ Since 1527 ordering the sederunt of the session must have continued to be a problem, it having been one of the purposes of the 'table with greit letteris' of that year to obviate the difficulty.²⁰

Over thirty lords were specifically named, of whom fourteen at least were required to sit daily with the chancellor. They could be absent only with his permission.²¹ Like the 1527 ordinances, the 1530/31 ordinance was signed by the king. It is interesting, and perhaps significant, that this ordinance should have been made within a month of the arrival of Erskine, the royal secretary, in Rome, and little more than six months before the papal bull concerning the supplication of the king relating to his desire to establish a college of justice in Scotland. Is it just a coincidence that it is in this bull that we first hear of the project to establish a college of justice, coming months after an ordinance which betrayed a failure to resolve long-standing difficulties in the work of the session, and which had attempted to right them again? Hannay considered that the proposal for a college of justice was devised in Italy by Erskine and then passed on to Albany, who remained behind in Italy to represent the interests of the Scottish Crown. However, it could be that it

¹⁸Ibid.

¹⁹Ibid.

²⁰Ibid., p.272.

²¹Ibid., p.349.

represented an idea for a reconstituted session which had been thought out in Scotland as the means by which the well-known problems in the running of the session could be surmounted. Even the 1527 and 1531 ordinances alone imply that considerable thought was being given to the way the session was functioning and how this could be improved. There is no evidence for the origin of the proposal for reconstituting the session as a college of justice, but there seems no reason to discount the possibility that it sprang from a considered domestic policy, as opposed to being the improvised pretext of a crown servant engaged in papal diplomacy.²²

The ordinance of February 1530/31 was but the latest in a series which went back for five years, in which rules were promulgated for the conduct of court, and particular lords named to sit. The rules did not attempt to introduce new arrangements so much as to enforce existing ones. However, a particular theme of these years is the nomination of particular session judges, and it is here that we can see great continuity. Fourteen of the fifteen judges nominated in 1532 had been named in 1531, and eleven of them back in 1527. This implies that the king or his closest advisers knew whom they desired to sit on the session, but had to resort to formal devices both to ensure their attendance and to bar other lords from sitting. Since the session was a judicial sitting of the king's council itself, special rules were clearly required to exclude the generality of lords who could sit on council. The repeated naming of lords has often been seen as a sign that the exclusionary nature of these rules was not observed. This problem was successfully addressed, however, in the foundation of the college of justice.

²²For Italian models for the notion of a corporation of civil judges, see R.K. Hannay, *The College of Justice* (Edinburgh, 1932), pp.48-50; P.G. Stein, 'The College of Judges at Pavia', *Juridical Review* lxiv (1952), pp.204-213.

The very first article of the February 1530/31 ordinance declares that one of the specific reasons for its promulgation was the way the 'multitude of lordis ingyrand thaim indifferently in tymes begane to have voit in the sessioun and in decisioun of civile materis thar has bene baith gret confusioun and stop in the doing of justice and na ordour kepit tharin'.²³ This implies that the exclusionary rules were developed in an attempt to stop lords appearing to judge a cause, when those lords would then be partial in some way, or press the claims of kinsmen, retainers or tenants. The exact cause of the 'confusioun' is not apparent - did the regular lords of session themselves object to these occasional incomers? Or did litigants react to an appearance of unfairness in this situation? There are certainly occasional examples of parties objecting to the presence of individual lords on the bench, even when they were lords of session. For whatever reason, there seems to have been an intention to make the judicial personnel of the session a fixed pool of lords from 1527.

The idea of conciliar work being undertaken by a fixed body of men would have been novel. This is suggested by the repeated lists of nominees since 1527. As already mentioned, one reason was to stop lords from exerting an unwarranted influence over the judicial business of council. However, another may have been that the nominations tended to present themselves as governing only the particular session which was forthcoming, rather than 'the session' in general. The king's council itself was not a fixed body and so it was problematic to make the session comprise a fixed group of lords. That is why, despite the growing exclusivity of the session, the groups nominated to sit were usually well over thirty strong, of which it might be expected that half would sit at any one time.²⁴ In other words, the system used until 1532 was to have a large pool of lords of session, from which the lords of particular sittings would have to be drawn. The session was not therefore a fixed

²³Ibid., p.349.

²⁴See *ibid.* for the requirement of fourteen lords to sit with the chancellor.

body of judges in 1531: rather, it was drawn from a fixed body which was equivalent to the regular council itself.

The other reason given for the February 1530/31 ordinance was 'to put all thingis in bettir form'. It seems significant that the king and his council had this particular concern within seven months of the issuing of the papal bull first mentioning the college of justice. There is no evidence to link the efforts of 1527-31 with the conception of the scheme to establish a college of justice, but as a matter of speculation it seems just as likely that there could have been a link of this sort as that Erskine or Albany invented the idea without previous consideration. After all, Sir Thomas Erskine, who had been royal secretary since October 1526, had himself been a lord of session since at least March 1526/27.²⁵ There were other royal servants and councillors sitting regularly too - Otterburn, the king's advocate; Crawford, the justice clerk; John Dingwall, the provost of Trinity College Church; Sir William Scott of Balwearie; archbishop Gavin Douglas, the chancellor; and Alexander Mylne, abbot of Cambuskenneth. The ordinances since 1527 were being produced by somebody for James V to approve. It seems plausible to suggest that the impetus for these ordinances and the detail they contained may have derived from the work of these regular core-members of the session. In this case, the idea for a college of justice could have come from the same source. The mooted scheme could have lent to James V a suitable pretext for an approach to Rome for money, rather than simply having been concocted for no other reason than to justify such an approach. Hannay did distinguish a plan to endow the session (which he attributed to Archbishop Dunbar) from the scheme for a college of justice (attributed to Erskine), but both seemed to him to form a single 'pretext' for a papal subsidy.²⁶

²⁵*A.D.C.P.*, p.256.

²⁶Hannay, *College of Justice*, p.54.

The process of foundation

It has been already argued that the foundation of 1532 was, in one sense, another ordinance regulating the work of the session. In this sense, it seems likely that it was the result of similar considerations and experience to that which engendered the earlier ordinances. Whatever the case, just because the foundation of the college of justice functioned as a pretext for a grant of papal taxation, which far exceeded that which would be needed to endow such a college, it does not follow that it was intended to serve no other purpose (*pace* Duncan), and certainly not that it did not serve any other purpose.

The events of 1532

1532 is usually taken to be the year of the foundation of the college of justice. The form which the foundation took was the entrenchment of the pre-existing session, which, as we have seen, was a branch of the work of council which had certain discrete institutional characteristics. As already mentioned, it is possible that a desire to entrench the session in this way was responsible for prompting the scheme for something like a college of justice, which also would then have lent itself to the procurement of a papal subsidy.

1532 is, however, one of a number of significant dates in the foundation of the college of justice. It was a papal bull of 13th September 1531 which imposed what is known as the 'great tax' upon the prelacies of the Scottish church in view of the desire of James V to establish a college of justice.²⁷ Then there is the act of parliament of May 1532, followed by acts of sederunt of the same month.²⁸ A further

²⁷Keith, *History*, pp.464-66.

²⁸*A.P.S.* ii, p335, c.2; *A.D.C.P.*, pp.373-77.

papal bull of March 1534/35 actually instituted the college of justice²⁹, and this was formally accepted by a provincial council of the Scottish church in March 1536.³⁰ This bull was only ratified by parliament in 1540/41.³¹ The erection of the college of justice was again ratified by parliament in 1543.³² The process of establishment, at one level, therefore took ten years. Upon further consideration, though, it is 1532 which stands out as the significant year.

1531 had seen the grants of papal taxation. If the desire to found a college of justice was no more than an excuse or pretext for this taxation, it is perhaps surprising that machinery to set up the college should have been set in motion within months of the bull of 13th September 1531, which imposed the Great Tax. On the other hand, since it was to take James V until the early 1540s to collect this tax, it might be argued that his authority to do so would be enhanced by a readiness to act upon his proclaimed desire to found a college of justice.

On 11th March 1532 the king summoned a parliament specially to enact the statute on the college of cunning and wise men, the college of justice. The proclamation makes no mention of this particular purpose, using a more general form of words that the king 'has divisit and ordanit ane parliament...for certaine gret materis...concerning the universale wele of this realm'.³³ This, of course, is simply a standard form used in proclamations of parliament, and carries no particular import in this context. That parliament was summoned specially with this intention in mind can be inferred from the fact that only three general statutes were passed, of which

²⁹Keith, *History*, pp.467-82.

³⁰*Statutes of the Scottish Church, 1225-1559. Being a translation of Concilia Scotiae Ecclesiae Scoticanae Statuta...with Introduction and notes by David Patrick* (Scottish History Society, Vol. 54, Edinburgh, 1907), pp.238-42.

³¹*A.P.S.* ii, p.371, c.10.

³²*Ibid.*, pp.424, 443, c.7.

³³*A.D.C.P.*, p.371.

one was simply an ordinance that a previous statute be more stringently executed, and another a traditionally expressed statute on the authority and freedom of the church which in one form or another was passed at the beginning of every parliament. The only notable legislation of the parliament was the statute concerning the institution of a college of cunning and wise men, which is commonly referred to as the college of justice.³⁴ Also, it is worth noting that the statute on the liberties of the church was more elaborate than usual, and that a certified copy was given to Silvester Darius, the papal nuncio, to give to the Pope, implying again that the main purpose of the parliament had been to produce this act.³⁵

Hannay viewed this act as rather hollow in content, commenting that 'no scheme had been thought out.... The ill-considered suggestion for "a college of judges in civil causes" was now found to involve serious practical difficulties in realisation', leading to 'attempts to fix an extraneous type of institution to the "lords of council and session" as they had evolved during the best part of a century....'.³⁶ It seems that he was referring in particular here to the necessity of including a right for the chancellor and up to three other lords, nominated by the king, to sit. This is rather an over-dramatisation by Hannay, with his talk of extraneous institutions. The college was not based conceptually on any such institution, although its name could have derived from one.

Hannay was struck by the lack of detail in the act and its reliance upon an intention to found a college, rather than an express and immediate act of foundation. The act does declare that 'the said college may be institute at mare lasare'.³⁷ However, if the parliament had been specially summoned with a view to establishing

³⁴*A.P.S.* ii, p.335, c.2.

³⁵Hannay, *College of Justice*, pp.55-56; *A.D.C.P.* p.379, 17th June.

³⁶Hannay, *op.cit.*, pp.56-57.

³⁷*A.P.S.* ii, p.336.

the college of justice, that would have left a period of two months or so to contemplate a scheme after the proclamation. What 'mare lasare' may imply is not that no scheme had been thought out (because one could have been thought out), but that it was considered obvious and more appropriate for the lords of session to make the detailed rules for the new college, rather than parliament. Unlike the position forty or fifty years earlier, the session was a much more regular and coherent body, and therefore more capable of fulfilling such tasks, and the lords could be delegated to do this by parliament quite appropriately. On this basis, therefore, the statute is best represented as a political act, and a formal statement of design, rather than as a detailed regulatory scheme in itself. Sure enough, less than a fortnight after this parliament, we find that detailed rules are ordered to be made by the lords of session, and duly are, with detailed provision for the operation of the court.³⁸

The remaining aspects of institution not dealt with in May and June 1532 were concerned solely with the implementation of the financial endowment, and the official confirmation of the arrangements by the Pope and parliament. Such confirmation is found in a papal bull erecting the college, necessary only because it was being funded by ecclesiastical monies. Confirmation in the statute of 1540/41 ratified all the arrangements finally. These matters were incidental to the functioning of the new college, whose establishment was otherwise complete in 1532.

1532 as initiation of a supreme court

There has been a tendency to see this foundation as being merely a matter of endowing a pre-existing institution, with endowment being the only significant

³⁸*A.D.C.P.*, pp.373-78.

change to that institution. Hannay referred to the 'lords of the session, now endowed for a particular function'.³⁹ One of the reasons, though, why Hannay placed so little weight on 1532 may have derived from the theoretical model he adopted in analysing council and session in terms of the differentiation of function within the king's council, which produced separate departments of activity. He pointed to a 'long development'⁴⁰ which saw what he termed 'specialisation of function'⁴¹. He was apparently only prepared to recognise a supreme central court, though, once the lords of session experienced 'complete segregation from other activities of council'.⁴² The concept of differentiation of function is a very useful analytical tool which can help to provide a theoretical explanation of developments in the council since the early fifteenth century. However, an undue pre-occupation with this analytical model seems to have misled Hannay into ignoring the true significance of 1532. He compared the college of justice with his model, and because it did not conform exactly to it, he concluded that this was not yet a supreme central court and that differentiation of function was not advanced far enough for this transition to have been made. This is a direct importation of anachronistic standards by which to test historical evidence. The session is best examined on its own terms and in historical context, as well as in terms of this theory. If this is done, then 1532 comes to seem far more significant than Hannay suggested.

It would be wrong to suggest that 1532 represented a momentous 'turning-point', in the sense of a sudden discontinuity consequent upon the foundation of a new central institution. The foundation of the college of justice is itself less significant than that it entailed the reconstitution of the session, with decades of development already behind it. Even so, 1532 did see institutional change, just as

³⁹Hannay, 'Antecedents', p.122.

⁴⁰Ibid.

⁴¹Ibid., p.112.

⁴²Ibid., p.122.

1527 had done, and so even on that level there was a definite development in 1532. This institutional development was particularly significant, undoubtedly so when set beside the jurisdiction of the re-constituted body.⁴³

The only recent scholar explicitly to argue for the point of view that the institutional development of 1532 was significant is Dr. Athol Murray, in his study of Sinclair's *Practicks*. Upon turning to consider the jurisdiction of the session he commented that 'this was indeed a supreme court, and though historians have tended to play down the significance of the events of 1532, contemporaries saw them as marking a definite change in the nature of the court'.⁴⁴ This comment has been noted by Professor MacQueen, although more as an illustration of historiographical change,⁴⁵ and also by W.D.H. Sellar in support of the argument that there was a 'jurisdictional shift' in 1532.⁴⁶ Dr. Murray would allow for a recognition by contemporaries that the college of justice was a development of a familiar institution, the session, but might perhaps argue that they saw it as adopting a new role after 1532. However, it should be noted that Dr. Murray's evidence was a case of 1544, some twelve years after the foundation, and his observation is therefore concerned with 'contemporaries' of the 1540s. This means that on the basis of this evidence one can only say that within twelve years of 1532 contemporaries saw the events of that year as marking a definite change in the nature of the court. Even that point presents difficulties, since the view expressed in that case that 'the lords of council were also judges ordinary in all civil actions within the realm, by the first institution of the college of justice' was simply an argument submitted to the lords, albeit one which they seem then to have approved.⁴⁷ The use of an argument to

⁴³The point about jurisdiction was strongly emphasised by W.D.H. Sellar in 'Common Law', p.94.

⁴⁴Murray, 'Sinclair's Practicks', p.98.

⁴⁵MacQueen, 'Jurisdiction', p.62.

⁴⁶Sellar, 'Common Law', p.94.

⁴⁷*Lord Bothwell v. Flemings* (1543), Mor. 7322.

persuade a court to make a particular decision is not evidence of any belief held by the pleaders. The role of the pleader is to cite what authority he can find in support of his submissions; such is the nature of adversarial, forensic debate. It is quite possible that the pleading was simply lifted out of the 1532 act to make an argument, rather than that it was a statement of a widely held opinion. In what appears to be a different case with similar facts a few days later, the lords advocated an action to the session, because the case had been waiting upon a hearing so long in the admiral's court. The lords' decisions in both cases could simply reflect a desire to accelerate unduly slow litigation, rather than any view that such matters ought to come before the lords. Since both cases involved *spuilzie*, one would perhaps expect the pre-1532 sessions to have had jurisdiction anyway, despite the pleading of the issue of heritage.⁴⁸

That the jurisdictional proposition just cited was not necessarily representative of a widely held opinion is quite possible, given that a series of different arguments was used in this case, with the lords apparently commenting only on one in particular - that actions begun before them could not be repledged into any of the common law courts, although it is not clear in the printed reports whether this was a pleading or a ground of decision.⁴⁹ It is not possible, then, to draw any definite inference from this case about the contemporary significance in 1532 of the foundation of the college.

However, it draws attention to a second argument, that whether or not 1532 was seen at the time as being significant, nevertheless the consequences of 1532 were significant, certainly by the early 1540s. An example would be the claiming of exclusive jurisdiction in important matters such as fee and heritage, which at

⁴⁸*A.D.C.P.*, p.539.

⁴⁹Murray, *op.cit.*, p.99.

common law had been outwith the jurisdiction of council and session, but which the evidence surveyed elsewhere in this thesis suggests was by 1532 within it, although not exclusively so. This in turn raises the issue of whether those 'consequences' were actually the products of 1532 or whether they resulted from a pre-existing track of development.

Institutional change with reference to the statutes of the court

Even accepting that the foundation of the college of justice was essentially a reconstitution of the session, what, if anything, marked a change in 1532 in institutional terms? Hannay did not stress any particular change, characterising the acts of sederunt of 1532 as marking 'a distinct advance in order, but no breach of continuity with the past'.⁵⁰ It should perhaps be remarked here that continuity with the past should be expected, but that it does not preclude there still being changes which are significant. Continuity follows on from the college being an adaptation of an old institution rather than the invention of a completely new one, but adaptation can still introduce new features.

It has never been clear from a formal point of view when the college was technically 'instituted', as already discussed. The 1532 act speaks of the king's intention in this respect. However, the persons to be chosen 'sall be auctorizat in this present parliament to sitt and decyde apon all actionis civile and none utheris to have voit with thaim onto the tyme that the said college may be institut at mare lasar'.⁵¹ When he wrote to confirm the statutes which the lords of session then made to regulate the court, the king made no reference to institution as such, and though

⁵⁰ *A.D.C.P.*, p.xxxix.

⁵¹ *A.P.S.* ii, pp.335-36, c.2.

he cites the 1532 act, he does not express himself by using its language or terms.⁵² He talks of having 'in our last parliament chosin ane certane number of personis spirituall and temporale to be upoun our daylie sessioun and to minister justice equallie'.⁵³ The papal bull which came in March 1534/35 seems to have given papal confirmation to the institution, it having already occurred, and the act of 1540/41 is simply one of ratification. There is therefore no occasion on which the king explicitly 'instituted' the college in terms of the 1532 act. However, the import of his letter of 10th June 1532 seems to be that it is with the ratification of the 'statutes' made by the lords that the college of justice was 'instituted'. The fact that the word 'institute' is not used is no reason not to view the act of parliament and the statutes made by the lords as together establishing the college, which is all that the word 'institute' connotes. The implication of the phrase 'mare lasar' has already been discussed. So, the ratification of these statutes would appear to complete the process of institution which the act of parliament had envisaged as happening at 'mare lasar'.⁵⁴

The content, form of composition and manner of promulgation of these statutes serve to emphasise a change in the nature of the session which is a product of the foundation of the college of justice. The act of parliament had envisaged 'uthir rewlis and statutes as sall pleise the kinges grace to mak and geif thaim [i.e. the lords of session] for ordouring of the samin' [i.e. ordering of the ministration of justice].⁵⁵ In the event, the king delegated formally the responsibility of making these statutes to the lords who were named in the act ('and als thai have at our command maid certane statutis and reulis'⁵⁶). The king subscribed these statutes and

⁵² *A.D.C.P.*, pp.377-78.

⁵³ *Ibid.*, p.377.

⁵⁴ *Pace* Hannay, 'On the Foundation of the College of Justice', *Scottish Historical Review* xv (1918), pp.30-46, at p.37: 'But the College of Justice was not founded'.

⁵⁵ *A.P.S.* ii, p.336, c.2.

⁵⁶ *A.D.C.P.*, pp.377-78.

wrote a letter as a formal instrument of ratification, all of which he commanded be entered into the council register. In the letter of ratification, he adopted a highly formal mode of expression, declaring of the statutes that 'the quhilkis...we have subscrivit wyth our hand, [and] heirfor of our awin free motive and propir will ratifiis and apprevis be thir presentis all and sindrie the saidis statutis'.⁵⁷ This procedure and degree of formality is not evident in any of the ordinances made up to this point by the lords of session or the king himself. The contrast with the ordinance of February 1530/31 is very noticeable, being a list of articles presented by the chancellor, and simply signed at the end by the king.⁵⁸ Moreover, the king bound himself not to ask the lords of session to do anything which would involve breaking these statutes 'maide be thame at our command',⁵⁹ suggesting that the statutes were perceived as a kind of constitution for the court. The institution governed by these statutes was still 'our daylie sessioun', but these observations suggest that all concerned viewed the foundation of the college as having brought about a formal change in the status of that 'daylie sessioun', and that its nature was indeed different.

The act of parliament had explained that the college of justice was to be instituted 'becaus our soverane is maist desyrous to have ane permanent ordour of justice'. This is in contrast to the transitory nature of the ordinances for the session in the 1520s, when the various measures seemed very much designed for the next session, rather than for the session *simpliciter*. For instance, the council register for 13th November 1531, states that the 'lordis of counsale in this present sessioun' ordain that the king's command for the last session be observed 'in every point'.⁶⁰ A marked change seems to be evident when on 13th July, 1534, the bishop of Ross was

⁵⁷ *A.D.C.P.*, p.378.

⁵⁸ *Ibid.*, pp.349-50.

⁵⁹ *Ibid.*, p.378.

⁶⁰ *Ibid.*, p.366.

admitted to the session, promising on oath to 'observe and keip all statutis, actis and ordinancis maid be the kingis grace and lordis forsaide for ordouring of the said sessioun'.⁶¹ The implication is that after the institution of the college of justice the session was seen as a permanent institution, and from that date its statutes and ordinances are considered to have an enduring quality requisite with the permanence now ascribed to the exercise of its functions in the form of a college.⁶² Confirmation of this is found in the formal order to the lords of session to 'advise, counsell and conclude upon sic rewlis, statutis and ordinancis as sall be thocht be thame expedient to be observit and kept in thar manner and proceeding at all tymes'. Once made they are to be 'observit and kept by the saidis lordis of sessioun, advocatis and procuratouris of the samyne, and be all clerkis, scribes, maseris and uther ministeris of court *in all tymys cummyne*' (emphasis added).⁶³ Why would the process of foundation have extended to this level of formality, detail and unlimited duration unless something of significance was happening to the nature of the session in 1532?

There is a strong suggestion, too, that upon institution the session acquired more of a corporate identity. Although the word 'college' seems little used, nevertheless the concept which underlay the arrangements of 1532 and the nature of the session from 1532 does seem to be geared not just to an institution, but to a corporate institution. As such it seems from its very instigation as a college to have acquired interests and privileges to protect and enforce, and this can again be traced in the king's letter of ratification of 10th June 1532.⁶⁴ James promises to 'auctoris, manteyne and defend all the saidis lordis, thair personis, landis and gudis fra all

⁶¹Ibid., p.426.

⁶²To qualify the contrast I have made with the ordinances of the 1520s, it should be mentioned that when the king delegated his power to receive the oaths of lords named to sit, it was the oaths of those 'nemmit of this session'.

⁶³*A.D.C.P.*, p.374.

⁶⁴Ibid., p.378.

wrang...be ony maner of persoun',⁶⁵ and will punish those who seek to harm them. He will also punish those who falsely attack or make unfavourable insinuations about the character and honesty of the lords of session, 'becaus the saidis lordis...presentis our persoun and beris our auctorite in the doing of justice'.⁶⁶ They should be 'privilegit abone utheris' because of the office that they exercise, and are to be exempt 'fra all paying of tax, contribution and uther extraordinare chargis to be upliftit in ony tymes cuming'. At 'the saidis lordis consideratioun', those who offend or dishonour the lords may be imprisoned in Edinburgh Castle, or any other royal castle, whether 'the falt be smal and injurious' or 'grete'. The letter is suggestive of a formal grant or charter, and its terms seem to signify a perception by the grantor, the king, that his lords of session were acquiring a new status.

It is puzzling why the king bound himself in this way with formal undertakings unless in some way he saw the college of justice as involving the re-foundation of the session as a new entity. Granting the lords rights, privileges and protections would seem to imply that they were now to assume an identity distinct from that of the king's council. This would have been a decision in principle, but while a formal change in status occurred, this change could not be followed by the kind of 'complete segregation' of the lords of session from other activities of council which Hannay looked for. To demand that that test be satisfied before recognising the changes as of significance would be to misunderstand the nature of sixteenth-century government. The administration of Scotland was conciliar at this time, and for a king to rule was for him to do so personally at an executive level, albeit through his councillors. The establishment of the session as a college of justice would not lead to an expectation that it should now be wholly independent of king, council and government generally. Since government was by the king and his

⁶⁵Ibid.

⁶⁶Ibid.

council, a court which was not a common law court, was not manned by lords of council as such, and was independent and removed from the king and council, would have seemed to lack a formal source of authority. Therefore, it was both natural and necessary that the lords of session remained lords of council, and this connection is evident in the king's letter of ratification. Hannay also viewed complete segregation as impossible, but he ascribed this merely to 'conservative feeling in the great ecclesiastical and temporal lords'.⁶⁷

For example, the king's promise 'nocht be ony privat writting, charge or command' to ask the lords to do anything which would break their statutes or would go against justice is something which was necessary precisely because the lords of session were still lords of council.⁶⁸ The reconstituted session was a central court, but remained within a curial framework (Hannay's term for the structure of conciliar government). Over the course of time it would naturally develop greater independence from this framework. The logic of such a development would never have been worked through instantaneously, for reasons already mentioned. A practical reason why the session could not have experienced formal 'segregation' was that it consisted of the same men whom the king depended upon as lords of council. Scottish government was small-scale, intimate and carried out by a comparatively small core of councillors whose continued contribution would be necessary whether or not they were also lords of session in the reconstituted court. Together, these reasons also explain what Hannay viewed as the difficulty of adapting a foreign institution to fit the lords of council and session which led to 'curious anomalies' - by which he probably meant the inclusion of the chancellor and other lords of council upon the bench.⁶⁹ Their inclusion, though, can be seen not so much as indicating a

⁶⁷Hannay, 'Antecedents', p.122.

⁶⁸*A.D.C.P.*, p.378.

⁶⁹Hannay, *College of Justice*, p.57.

practical difficulty in realisation, but as evidence of the perception already described that even a central court dispensing the king's justice must be seen as operating within a curial framework.⁷⁰ Conceptually, this is the only way that contemporaries would have been able to think of the court, given its conciliar origin and function.

The declaration in the parliamentary act of 1532 that the 'processes, sentences and decretis' of the lords who had been chosen to be of the college 'sall have the samin strength force and effect as the decretis of the lordes of session had in all tymes bigane',⁷¹ apart from stressing the continuity in their legal authority, also serves to legitimate them by ensuring that despite any change that was recognised in the nature of the court, its sittings were still identified with sessions as judicial sittings of council before 1532.

From the evidence discussed, it is possible to infer that change there was, and change which was perceived as such by king and council. The statutes promulgated by them are a comprehensive code of 'ordour', like rules of court, and introduce regulation of matters which had never been touched upon in previous ordinances of the session, such as the conduct of advocates. The overriding impression is of an institution being demarcated as a court anew, so that those entitled to sit as judges - 'to have voit tharin'⁷² - should now exercise their jurisdiction within a discrete institution which was formally separated from council though still conjoined through personnel. There is a direct analogy with the right of only certain members of the House of Lords to sit on its appellate committees in modern times.⁷³ This impression confirms the remark of Dr. Murray quoted earlier, about a definite change in the

⁷⁰*Pace* Hannay, in *A.D.C.P.* at p.xlii.

⁷¹*A.P.S.* ii, p.336.

⁷²*A.D.C.P.*, p.374.

⁷³Murray, 'Sinclair's Practicks', p.90.

nature of the court, and the evidence discussed here complements that presented by him from a later date.

Changes to the session caused by the foundation of the college of justice

(i) Incorporation as an autonomous institution

Hannay observed that in 1524 'there is no sign of any body of men who are to be "of council" with special regard to work on the session'.⁷⁴ Duncan applies the same observation to the whole period 1513-26.⁷⁵ Clearly in this period most lords of session were regular lords of council.

However, as already discussed, it was in 1526, 1527 and 1531 that measures were adopted which began a process of restricting the right of attendance on the session to a specified number of named lords, and removing the right of lords of council to do so without specific commission. The 1532 act completed this process by making the session institutionally autonomous through incorporation as the college of justice. Incorporation under the terms of the act meant that the lords of session became a definite, exclusive, restricted and permanent body, which regulated admission to its membership. The lords of session remained lords of council, and gave decree as lords of council, but from 1532 a lord of council was not *ex officio* a lord of session. The view of Professor MacQueen that 'the erection of the college effected no change in the structure, personnel or record-keeping of the court' must

⁷⁴Hannay, 'Antecedents', p.112.

⁷⁵Duncan, 'Central Courts', p.336.

therefore be qualified.⁷⁶ In fact, a crucial change in the structure of the court was effected in 1532.

The new structure is set down in the act. The king 'thinkis to be chosin certane persounis maist convenient and qualifiyt thairfore to the nowmer of xiiij persounis, half spirituale half temporall, with ane president'. This is structurally a fundamental change from simply allowing any lord of council to sit upon cases in the session. These lords are to be authorised to sit on all civil actions 'and nane utheris to have voit with thame onto the tyme that the said college may be institute at mare lasare'.⁷⁷ The clear implication is that once the college is instituted it will only be those who have been admitted as members of the college who will have authority to exercise its jurisdiction. The right of the chancellor to preside is retained, along with the right of 'sic uther lordis as sall please the kingis grace to enjone to thaim of his gret counsell to have voit siclik to the nomer of thre or four'. This clause plainly envisages a separation between the two bodies of council and session, to the extent that it is necessary to have such a clause if any lords of council are ever to sit on the session without being members of the college. Moreover, it is just as likely that the purpose of this clause was to enable the sederunt of the session to receive a welcome strengthening from time to time, for example in vacation, rather than to secure some kind of constitutional right for the king to interfere by imposing lords of council onto the bench when he wished to exert some kind of special influence. It is true that this clause represents an exception to the general conception of an institutionally separate college of justice, but in its proper context it is as much a facet of the new structure of the court as the naming of fourteen lords and a president to have exclusive control over session matters. This is because the general right of the king to have any person serve as a lord of council is replaced in relation to the session

⁷⁶MacQueen, *Common Law and Feudal Society*, p.242.

⁷⁷A.P.S. ii, pp.335-6, c.2.

with a limited right to have his chancellor and only three or four lords of council adjoined to the session *ex officiis*. Thus the king's freedom is considerably curtailed, and is preserved in limited form by statute as an exception to the general rule. The general rule is articulated again at the end of the act: only those named are to 'subscribe all deliverancis and nane utheris eftir that thai begyn to sitt to minister justice'.⁷⁸

This interpretation of the significance of 1532 has also been advanced by Dr. Athol Murray in his study of the relationship between James V's exchequer, council and session. He drew attention to the fact that 'under the 1532 act the lords of session became a restricted body, comprising only a president and fourteen ordinary senators of the college of justice. This can be compared with the thirty-eight lords chosen to sit in the session as recently as December 1531. Henceforward new appointments could only be made as vacancies occurred, though the king did have power to nominate additional "extraordinary lords" '.⁷⁹ The lords of session became 'a permanent, paid body of judges'.⁸⁰

The existence of this new structure is recognised in the council register itself, in a change in record-keeping which has not received attention before. If the sederunt listings of the session are examined a change is immediately apparent after May 1532. Rather than listing individually the names of the lords in attendance, it is very often recorded only that the lords of session sat, after which a list of those absent is given. This presupposes a fixed and recognised number of lords constituting the court and thereby exercising collegiate authority as the lords of session. For example, on the first sitting of the session after the foundation of the

⁷⁸Ibid.

⁷⁹A.L. Murray, 'Exchequer, Council and Session, 1513-1542', in *Stewart Style 1513-1542, Essays on the Court of James V*, ed. J. Hadley Williams (East Linton, 1996), p.110.

⁸⁰Ibid., pp.108-9.

college the sederunt is given as 'sederunt domini sessionis except Decano de Dunbar'.⁸¹ The authority exercised was that of the council, but the right to exercise it was exclusively vested in the lords of session. This new practice of recording the sederunts was not invariably maintained, and is particularly, and perhaps significantly in evidence in the first few months of the college's existence, but it was nevertheless new and would seem to reflect the new corporate identity which had been assumed by the lords of session.⁸² This is also not the only feature of the record worthy of comment. Whilst the decisions of the session continued to be recorded in the same way as before 1532, in the council register, and whilst the entry for the 27th May, 1532 would originally have occurred in the middle of a volume of the register rather than at the beginning of a new one (which new one was deemed the first in a series designed the *Acta Dominorum Concillii et Sessionis* only in the nineteenth century), this does nothing to remove the impression of a new departure given by the unprecedentedly decorated and elaborate entry which records the foundation of the college and the statutes of the court on that day.⁸³

Occasionally, further minor aspects of the record suggest to some degree a self-consciousness amongst lords of session as to the offices they held in the new college. For example, when taking instruments on a particular matter on 17th June, 1532, the abbot of Cambuskenneth is designed as 'precedent' in addition to his abbatial title.⁸⁴ Furthermore, that this new order and status in the session was seen as enduring and as springing from the act of 1532 is confirmed by the way in which some new lords of session were appointed in November 1532. Three new lords were named by the king, 'to be ekit to the remanent of the lordis tharof chosin of befor,

⁸¹SRO CS 6/1, f.9.

⁸²Dr. Murray also recognised this feature of the record and commented that it was 'a change from pre-1532 practice, though decrees continued to be in the name of the "lords of council" '. Murray, *op.cit.*, p.109.

⁸³SRO CS 6/1, f.1.

⁸⁴SRO CS 6/1, f.25.

becaus thar is divers deid, sum seik and sum away of the saidis lordis of session, quharthrow thar is nocht sufficient nomer conforme to the act maid tharupon of befor'.⁸⁵

(ii) Jurisdiction

Jurisdiction is clearly a fundamental issue for any court, since it determines upon what matters the court may adjudicate - the extent of its power to decide. It is therefore of crucial importance to ask what jurisdiction was intended to be exercised by the college of justice. Two possibilities are that it was to be the same as that of the session, or an expansion to a wider jurisdiction. The particular importance of this question lies in the common law rule excluding the council and session from jurisdiction in fee and heritage, the nature of which has already been examined elsewhere in this thesis. There is also, however, a third, less clear-cut possibility, which is that by 1532 the session had already come to exercise a jurisdiction which was wider than its traditional one, including fee and heritage, but that it was only with the foundation of the college of justice that this *de facto* state of affairs was given formal recognition *de iure*. Whether or not the 1532 act was a *de iure* recognition of this sort, the evidence surveyed in the chapters on jurisdiction suggests that by 1532 there was no remaining limitation on the session's jurisdiction over fee and heritage.

In the early sixteenth century, Scotland had a complex pattern of local and national jurisdictions. There was no single omnicompetent court with jurisdiction over all matters dealt with in other courts. Obviously, parliament and the king's council occupied special positions in that they had jurisdiction over the whole of

⁸⁵ *A.D.C.P.*, p.389.

Scotland and had virtually a full civil jurisdiction, the other courts consisting of primarily burgh, baron, sheriff, stewartry, bailie, regality, justiciar's, admiral's, church commissary and official's courts, as well as the Roman rota and the *ad hoc* courts of papal judges-delegate. That is why the foundation of an institution which was or became a central omnicompetent court is of such interest, although even after 1532 various matters were to remain reserved to other jurisdictions and were not included in the definition of civil matters, the category of actions over which the college had jurisdiction. By the early sixteenth century, the only significant limitation within the common law on the jurisdiction of the session was that it seems to have had no general right to determine issues of fee and heritage. This limitation grew up in the fifteenth century, as we have seen. It is therefore remarkable that neither Hannay nor Duncan even raised the question of the jurisdiction to be exercised by the college of justice, let alone considered the evidence we have of the decisions of session in these matters at the time.

The word 'jurisdiction' does not appear in the part of Professor Duncan's article which discusses the council after 1489, and the college of justice.⁸⁶ Hannay did remark of the 1532 act that 'the continuity of the jurisdiction with that of the session was expressly affirmed'⁸⁷, although he did not cite the evidence he had in mind. He was probably thinking of the section of the act which gave decreets of the new college the same force and effect as those of the lords of council and session, since in *The College of Justice* he drew attention to this clause as an example of 'continuity', although without mentioning the question of jurisdiction.⁸⁸ However, this clause does not in any case have any bearing on jurisdiction as such, since a decret is an order of the court giving an executive force to its decision. The status

⁸⁶Duncan, 'Central Courts', pp.334-36.

⁸⁷Hannay, 'Foundation', p.37.

⁸⁸Idem, *College of Justice*, p.39.

of a decret is an ancillary matter compared to the question of which issues may in the first place be decided, and so the concept of jurisdiction is wholly distinct. Provisions relating to the force of decreets are concerned with ensuring that the judgements of the court are observed, rather than determining upon which issues judgement may be given. Therefore, it seems that the work of both Hannay and Duncan rests upon the unexamined assumption that the jurisdiction of the college was the same as that of the session. Whilst this may prove to be a reasonable assumption, it would nevertheless be misleading if it were also assumed that this jurisdiction still did not extend to fee and heritage.

The question of jurisdiction was discussed by Dr. Murray in an article published in 1981,⁸⁹ and analysed with explicit reference to previous historiography by W.D.H. Sellar in two articles published in 1988 and 1991.⁹⁰ However, the only detailed study of the jurisdiction of the session after 1532 was published in 1984 by Professor MacQueen,⁹¹ investigating issues previously adumbrated in his article of 1982, 'The Brieve of Right in Scots Law'.⁹² In his article on Sinclair's *Practicks*, Dr. Murray had already observed of the 1540s that the court can be seen to be claiming both concurrent jurisdiction over certain matters previously pertaining solely to other courts, and, in certain classes of action, exclusive jurisdiction over these matters as well.⁹³ Dr. Murray was analysing the cases reported in the *Practicks*, however, which only report cases from 1540 onwards. Professor MacQueen surveyed a selection of evidence for the 1530s as well as the 1540s and later, concluding that 'the jurisdiction in heritage of the lords of council and session seems therefore to have been developed over a period of years rather than in any one particular case',

⁸⁹Murray, 'Sinclair's Practicks'. p.98.

⁹⁰Sellar, 'Common Law', p.94; idem, 'A Historical Perspective', in *The Scottish Legal Tradition*, ed. S. Styles (Edinburgh, 1991), pp.29-64 at p.44.

⁹¹MacQueen, 'Jurisdiction in Heritage'.

⁹²*Journal of Legal History* iii, (1982), pp.52-70.

⁹³Murray, op.cit., p.99.

and of the parliamentary acts of 1532, 1540/41 and 1543, 'the acts were not intended to be of particular significance, or to change the character of the court, at the time they were passed; but nonetheless as acts of the Scottish parliament they could be used to give legal authority to what clearly appears as an expansionist attitude of the court to its jurisdiction in the 1530s and 1540s'.⁹⁴ This is a plausible interpretation in itself, providing a coherent model of jurisdictional change. It supports Professor MacQueen's earlier view that 'the institution of the college of justice did not immediately affect the court's exclusively conciliar jurisdiction'.⁹⁵ However, the cases examined by Professor MacQueen have been reviewed in Chapter Two, and a differing interpretation put forward which would suggest that by 1532 conciliar jurisdiction already extended to fee and heritage through the widespread use of the action to reduce infeftments, and that there is no evidence of a jurisdictional limitation still being in force by that time, or as the 1530s progressed. The effect of the act of 1532 has already been examined with reference to institutional change, and the conclusion drawn that the act effected significant changes. It will now be analysed from a jurisdictional point of view.

The act of 1532

Does the parliamentary act of 1532⁹⁶ imply anything about a change in the jurisdiction of the session? It is perhaps significant that the act of parliament made specific provision that 'the quhilkes persons sall be auctorizat in this present parliament to sitt and decyde apoun all actionns civile and nane utheris to have voit with thaim onto the tyme that the said college may be institut at mare lasar'.⁹⁷ This clause does not confer authority on members of the college as such, but rather

⁹⁴MacQueen, 'Jurisdiction', pp.82, 84-85.

⁹⁵Idem, 'Brieve of right', p.66.

⁹⁶*A.P.S.* ii, p.335.

⁹⁷*Ibid.*, pp.335-6.

confers interim authority on those who are to become members of the college when it is instituted. The emphasis seems to be on maintaining continuity between the arrangements which are being put into effect immediately and those which will pertain once the college is properly instituted. Again, whatever the jurisdiction was, the clause seems addressed to the question of who is entitled to exercise it during the interim period.

There are really three bodies at work in 1532: the session; the interim session, functioning as the incipient college; and the session functioning as the college. It may be significant that the interim session required to have the jurisdiction of the college conferred upon it, and that it was not simply left to function as the old session till further notice. Indeed, the conferral of jurisdiction is expressed in terms of the act when it states that the chosen men are to 'sitt and decyde apou all actiouns civile'. This could have been simply to avoid confusion about whether the session was being replaced and the nature of the body now issuing decreets in the interim period. It seems to have been seen as important to be precise about the nature of the body which was sitting, so as to be sure of its jurisdiction and who was entitled to exercise it.

One possible implication of the way in which the act distinguishes the body which was to function up until the institution of the college from the college itself, is that the jurisdiction of the college was different from the pre-1532 session. When the session is ordered 'in the meyntym to deliver billis and call privilegit materis as thai sall think expedient',⁹⁸ while statutes are drafted, this is not evidence that the old session was merely functioning as it always had done and that the act had no effect upon it, because by 27th May this body was the interim one, under the act, expressly

⁹⁸*A.D.C.P.*, p.374.

exercising the jurisdiction of the college. If it were different, though, what would have been the jurisdiction of the college of justice?

The terms of the act do address directly the question of jurisdiction, although in a pithy and declaratory manner which does not allude to any particular matters of jurisdictional competence. The 1532 act declares that the purpose for which the college of cunning and wise men is to be instituted is 'for the doing and administracioun of justice in all civile actions'. Its members are to minister justice 'in sic causis as sall happin to cum befor thaim', and are authorised to 'sitt and decyde upon all actiouns civile'. Unfortunately, these phrases are not in the least conclusive whether 'all civile actiouns' meant civil actions generally, therefore obviously including fee and heritage, and impliedly overturning the common law rule excluding such cases from the jurisdiction of council and session, whether or not it was any longer recognised. It is conceivable that such a phrase could have had a more restricted, technical meaning so as to indicate simply the class of civil actions which could have been brought before the session by 1532, thus effecting nothing which would have entitled the lords of session to hear, for example, any matters outwith the jurisdiction of that body. There could be a significance attached to the fact that the phrase 'all civile actiouns' had never been used before in defining which civil actions were within the jurisdiction of council and session. In the past, the classes of action so included were listed individually.

W.D.H. Sellar argues for an immediate jurisdictional change occurring, which followed from these terms of the act.⁹⁹ Professor MacQueen, as we have noted, does not regard the act as particularly significant. The matter is certainly open to different interpretations, but when set against the interpretation of the lords'

⁹⁹Sellar, 'Common Law', pp. 94, 98, n.85.

jurisdiction as revealed in their decisions, set out in previous chapters, the most explicable view would be that those who enacted the 1532 legislation already assumed that the session recognised no limitation on its civil jurisdiction.

It may be puzzling that when exceptions relating to heritage were raised in the session after 1532, the jurisdiction clauses of the 1532 act do not appear to have been founded upon. As matters stand, the first case which we know of where the act was expressly founded upon is *Lord Bothwell v. Flemings* (1543),¹⁰⁰ when it was cited to meet a specific plea by the pursuer, who was arguing that the lords were not competent judges in the matter. This absence is perhaps the most telling evidence against the act having been intended to effect a jurisdictional change, although it is only indirect evidence. For direct evidence we must look at individual cases when the lords had to decide whether they were competent judges. Even here there is a difficulty, in that the grounds accepted by the lords for their decision are often not indicated.

Conclusion

The argument has already been advanced in this thesis that insofar as a coherent understanding of the traditional fee and heritage restriction on the jurisdiction of council can be derived from its decisions, this restriction was not being enforced by the period 1529-34, and may no longer have been recognised as enforceable. This means that it is impossible to maintain that the lords could not exercise jurisdiction in these matters in 1532.

¹⁰⁰*Lord Bothwell v. Flemings* (1543), Mor. 7322.

What of the situation whereby the lords already had jurisdiction in fee and heritage in 1532? If this was so, it could mean that by May 1532 it was the assumption that literally all civil matters could be decided upon by the new college, since the session had already developed and established this jurisdiction. Or else, it could at least mean that a process of establishing jurisdiction was underway prior to 1532 and a jurisdiction in fee and heritage was established in all but name. The conclusion which best explains the evidence of this and previous chapters is that the act of 1532 was cast upon the assumption that the college of justice would exercise a full civil jurisdiction, although its character was not in that respect that of a revolutionary legislative reform so much as a statutory recognition of the jurisdictional position which had already been developed. This would have one particular merit as an interpretation which is that the phrase 'all actionis civile' could be construed in a literal sense without supposing that the 1532 act thereby changed the jurisdiction of the session. Nevertheless, the terms of the act generally seem to speak to there being a conscious and formal change in the nature of the session in 1532. Even if it seems that the most significant changes were institutional, it can also be suggested that in terms of jurisdiction there may well have been change in the sense of a formal *de iure* recognition of the jurisdiction which the session had already come to exercise by the year of the foundation of the college of justice. However, even if no such *de iure* recognition was intended by the act, the principal argument of this thesis is that the lords already exercised a wide-ranging jurisdiction in 1532, and one which was free from the earlier fee and heritage restriction. On this basis, the institutional significance of the foundation of the college of justice can be regarded as allowing the session to assume the role of a supreme central court.

Appendix to Chapter One

(1) Cases involving unsuccessful protest or exception that council not a competent judge because of fee and heritage.¹

(i) *ADCi*, 1478-95

Jan.1492	p.263
Oct.1495	p.405
Nov.1495	p.424

(ii) *ADCii*, 1496-1501

Jan.1499/1500	p.300
Nov.1500	pp.433-4
Nov.1500	p.433

(iii) *ADCiii*, 1501-1502/3

July 1501	p.35	Alexander Inglis
July 1501	p.37	Wilyeame, earl of Eroll
July 1501	pp.40-1	Lord Erskin
July 1501	p.45	Lard of Wemyss
July 1501	p.51	Lord Lindesay
July 1501	p.58	Robert Charteris
July 1501	p.64	Andro Herring
Feb.1502	p.112	Lord Ross
Feb.1502	p.115	David Ker
July 1502	p.146	Lord Erskin
Feb.1503	p.210	Lard of Cragy Ross
Feb.1503	p.303	Earl of Buchan

p.t.o. for 1502/3-6

¹This list is of isolated protests or exceptions which did not lead to a remittance to the judge ordinary. However, in addition, it is assumed that in each case which was remitted to the judge ordinary there would have been pled an exception successfully.

(iv) SRO CS 5/14 to CS 5/18 (excluding CS 5/18(1))

March 22	1502/3	CS 5/14 f.58v.	Katryne Maxvale
March 24	1502/3	CS 5/14 f.69v.	Alexander Kirkpatrik ²
March 31	1503	CS 5/14 f.112v.	Schir Johne Hay of the Snade ³
April 4	1503	CS 5/14 p.156(typescript)	Alexander Barcare*
Dec.12	1503	CS 5/15 f.122r.	Alexander Campbell
Dec.12	1503	CS 5/15 f.122r.	Lard of Amisfeild
Dec.13	1503	CS 5/15 f.133v.	Lord Oliphant*
Jan.23	1504/5	CS 5/16 f.26v.	Lord Lindesay ⁴
Feb.12	1504/5	CS 5/16 f.74r.	Lord Lindesay* ⁵
Feb.15	1504/5	CS 5/16 f.83v.	Bishop of Orkney*
Feb.25	1504/5	CS 5/16 f.113r.	Alexander Naper ⁶
Feb.28	1504/5	CS 5/16 f.138	Lord Home*
March 7	1504/5	CS 5/16 f.168v.	Alexander Mure
March 8	1504/5	CS 5/16 f.177v.	Alexander Kilpatrick
March 15	1504/5	CS 5/16 f.228v.	David Lindissay
Nov.26	1505	CS 5/17 f.44v.	Alexander Crawford
Dec.11	1505	CS 5/17 f.102r.	Johne Cumyng
Dec.17	1505	CS 5/17 f.140v.	Lard of Gledstanes*
Dec.18	1505	CS 5/17 f.143v.	Schir Johne Hume
	1505	CS 5/18(1) f.67v.	Archibald, earl of Argyll
Feb.20	1505/6	CS 5/18(1) f.108v.	Archibald Dundas
March 4	1505/6	CS 5/18(1) f.145v.	James Henry
Jan.12	1506/7	CS 5/18(2) f.85v.	Lord Crechton
Jan.20	1506/7	CS 5/18(2) f.116v.	Lord Lindessay*
Jan.21	1506/7	CS 5/18(2) f.120v.	David Brus*
Feb.8	1506/7	CS 5/18(2) f.178v.	Lard of Cokpule*
Jan.10	1506/7	CS 5/18(2) f.182v.	Sir Robert Dunbedy*
Feb.12	1506/7	CS 5/18(2) f.193r.	Alane Borthwick*
Feb.26	1506/7	CS 5/18(2) f.227v.	Lard of Mordinton
Feb.27	1506/7	CS 5/18(2) f.231v.	Thomas Kilpatrick
March 2	1506/7	CS 5/18(2) f.245r.	Robert Crechton
March 3	1506/7	CS 5/18(2) f.248r.	Jonete Hammilton*
March 17	1506/7	CS 5/18(2) f.322r.	Lord Drummond
March 19	1506/7	CS 5/18(2) f.333v.	Abbot of Incheffrey

* indicates where it is not explicitly recorded whether the protest or exception is in relation to fee and heritage, or occasionally whether it relates to the competence of the lords.

²cf. Nov.28 1503 CS 5/15 f.74r. Alexander Kirkpatrik

³cf. Nov.22 1503 CS 5/15 f.54r. Schir Johne Hay

⁴cf. Jan.19 1506/7 CS 5/18(2) f.113r. Lord Lindessay*

⁵cf. Nov.28 1505 CS 5/17 f.51r. Lord Lindissay*

⁶cf. Feb.20 1504/5 CS 5/16 f.124r. Alexander Naper

(2) Cases which were remitted to the judge ordinary 1466-1506.

Oct.17	1467	ADA p.8	Lord Grahame v. William Graham
Nov.20	1469	ADA p.9	Archibald Ramsay v. Walter Lindissay
May 7	1471	ADA p.10	Abbot etc. of Lindores v. Philip Moubra
May 15	1471	ADA pp.13,15	William Sinklar v. George Hume
May 15	1471	ADA pp.13,15	Marion Sinklar etc. v. William Sinklar
May 16	1471	ADA p.13	Thomas of Wyntoun v. William of Rothven
Feb.20	1471/72	ADA p.20	John Crag v. Thomas Kynarde
Feb.29	1471/72	ADA p.21	Robert Hamyltone v. Alexander Balye
May 16	1474	ADA p.32	Henry Wemis v. David Hepburn
July 11	1476	ADA p.48	Andro Graye v. Patrik of Gordone
July 12	1476	ADA p.48	Laurence of Spens v. Laurence of Crechtone
Oct.19	1479	ADA p.93	Archibald Uchterlowny v. James Hair**
Oct.20	1479	ADA p.94	Johne Newman v. James Crechton
March 17	1482/3	ADCii p.cxvi	Jonet Monipenny v. Margret of Wemis
Oct.15	1483	ADA p.*123	William Aysoun v. Duncane Toyschach
Oct.7	1478	ADCi p.4	Gilbert McCormak etc. v. Robert Mure
Oct.8	1478	ADCi p.5	Johne of Petblatho
Oct.9	1478	ADCi p.6	Nichole Hostelar
Oct.9	1478	ADCi p.6	James Achilek & Margaret Hostelar
Oct.15	1478	ADCi pp.11-12	Tutors of Thomas Grandiston
Oct.21	1478	ADCi p.18	Androu Mowbray v. Johne of Berton etc.
March 15	1478	ADCi p.22	Arthur Forbace v. Johne of Wemys etc.
March 23	1478	ADCi p.25	Margaret Knichtson v. James of Cunniga
March 24	1478	ADCi p.26	Margaret Knichtson v. Laurence Bartrame
Oct.26	1479	ADCi p.36	Johne of Houstoune
Jan.18	1479/80	ADCi p.47	John Maxwell v. Robert Charteris
June 21	1480	ADCi p.57	Lord Kilmauris
June 21	1480	ADCi p.58	Johne of Porterfeide v. Thomas Schethun etc.
June 26	1480	ADCi p.63	Johne of Wemys v. Johne Anderson etc.
June 28	1480	ADCi p.65	Baldreide of Blakader v. James Bonar
June 30	1480	ADCi pp.67-8	Robert Crawford
July 4	1480	ADCi p.73	Alexander Harowar v. Thomas Harowar etc.
July 5	1480	ADCi p.73	Alexander Lawder v. Johne Olyfant
July 12	1480	ADCi p.78	Adam Blakader v. Thomas Edingtone
April 15	1483	ADCii p.cxxxi	Johne Fleming v. John Simple
Jan.28	1484/85	ADCi p.*103	William of Striveling
Feb.3	1488	ADCi p.104	Walter Oggistoun v. Johne Abbot
Feb.7	1488	ADCi p.118	Walter Halyburton v. Vinfra Colquhone
Nov.4	1490	ADCi p.161	James Levingstoun v. Cristiane Levingstoun
March 22	1490/91	ADCi p.188	Alexander Hume v. Johne Berry
March 1	1491/92	ADCi p.216	Umfra Colquhoun v. Jhone Culquhon
March 5	1491/92	ADCi p.223	Umfra Colquhoun
March 10	1491/92	ADCi p.228	Andro Filedare v. James Cader

Oct.26	1493	<i>ADCi</i> p.318	William Bothvile v. Johne of Menteith etc
Oct.27	1495	<i>ADCi</i> p.405	Lord Rothven v. Archibald Preston
Nov.4	1495	<i>ADCi</i> p.419	Andrew Gourlay v. Johne Gourlay
Nov.13	1495	<i>ADCi</i> p.429	Robert Waus v. Archibald Nap
April	1498	<i>ADCii</i> p.175	Willyeame of Stirling v. James Ogilby etc.
July 9	1498	<i>ADCii</i> p.258	James Hammylton v. Robert Hammylton
Nov.14	1500	<i>ADCii</i> p.434	Marion Sinclare v. David Hume
Dec.4	1500	<i>ADCii</i> p.464	William Campbell v. John Spark
March 24	1500/1	<i>ADCii</i> p.501	John Adamsone v. William Frog etc
March 3	1501/2	<i>ADCiii</i> p.123	Jonet Mure v. Alexandir Crummy
Nov.18	1503	CS 5/15 f.42v. Typescript p.39	Elizabeth Schaw v. Andro Mersar
March 8	1504/5	CS 5/16 f.178v. Transcript p.464	Margaret Johneston etc v. Alexandir Kilpatrik
March 12	1504/5	CS 5/16 f.202v. Transcript p.520	William Turnbull v. Johne Turnbull
Dec. 16	1506	CS 5/18(2) f.54r Transcript p.127	Alexander Kirkpatrik v. Johne Hume
March 1	1506/7	CS 5/18(2) f.237v Transcript p.589	William Dalzell v. Johne Nesbit

** indicates that the case may not be concerned with fee and heritage.

(3) Sitzings of Council and Auditors in relation to Remit cases

Year	Council ¹	Auditors ²	Cases ³	Notes on Council Record ⁴
1478	34	25	9	
1479	46	8	4	
1480	32	0	9	
1481	-	4	0	records missing
1482	-	13	1	records missing
1483	13	24	2	8 months-worth of records missing
1484	42	13	1	some gaps in the record
1485	6	0	0	only 1 months-worth of records extant
1486	-	0	0	no records
1487	-	0	0	no records
1488	29	0	2	
1489	15	0	0	
1490	46	0	3	
1491	44	0	3	
1492	62	0	0	
1493	14	16	1	
1494	33	15	0	
1495	33	0	2	
1496			0	There is no reference index which allows the sittings of council to be readily calculated for this period
1497			0	
1498			2	
1499			0	
1500			3	
1501	80		0	
1502	79		1	
1503	48		1	
1504	81		2	
1505	92		0	
1506	81		2	

¹number of days on which council sat, insofar as records survive, calculated from tables in *ADA* and SRO RH 2/1/8 and 2/1/9.

²number of days on which auditors sat, insofar as records survive, calculated from tables in *ADA* and SRO RH 2/1/8 and 2/1/9.

³this figure shows the number of cases remitted by council or auditors to the judge ordinary in that calendar year, because of fee and heritage.

⁴These notes relate to known lacunae, and contain information mainly derived from W.M. Gordon, 'The Acts of the Scottish Lords of Council: Records and Reports', in *Law Reporting in Britain: Proceedings of the Eleventh British Legal History Conference*, ed. C. Stebbings (London, 1995), pp.55-57.

Appendix to Chapter Three

Actions involving the pleading of an exception to the jurisdiction of Council and Session over fee and heritage:

Date	MS reference	Pursuer(s)	Defender(s)
28 July 1529	CS 5/40, f.74r.	Adam Hopper	Janet Turing & William Adamson
4 Aug. 1529	CS 5/40, f.81v.	The King	John Crichton & Ninian Seton
12 March 1529/30	CS 5/41, f.4	Janet Rowitt	Alison Ruche
19 March 1529/30	CS 5/41, f.22v.	Alexander Innes	Lord Oliphant
9 Feb. 1530/31	CS 5/42, f.40	Alexander Innes	Alexander Ogilvy
11 Feb. 1530/31	CS 5/42, f.46	Archibald Spittal	Finlay Spittal
15 March 1530/31	CS 5/42, f.119r.	Helen Rutherford	Mark Kerr
23 Nov. 1531	CS 5/43, f.92v.	Margaret Inglis	Melchior Cullen
2 Dec. 1532	CS 6/2, f.19r.	Wigtown	Whithorn
4 July 1533	CS 6/2, f.219	Thomas Duddingston	Steven Duddingston
13 March 1533/34	CS 6/4, f.65r.	The King & Prebendaries of Crieff	William Drummond

Bibliography

Primary Sources

(1) Unpublished

Scottish Record Office:

Acta Dominorum Concilii, SRO CS 5/40, 5/41, 5/42, 5/43.

Acta Dominorum Concilii et Sessionis, SRO CS 6/1, 6/2, 6/3, 6/4, 6/6, 6/8.

'Sederunts in *Acta Dominorum Concilii* 1501-1553' (typescript), SRO RH 2/1/8-9

Edinburgh University Library:

Sinclair's Practicks, Laing MS III 388a.

(2) Published

Acta Dominorum Concilii 1501-1503, ed. J.A. Clyde (Stair Society, 1943).

Acta Dominorum Concilii et Sessionis 1532-1533 ed. I.H. Shearer (Stair Society, Edinburgh, 1956).

Acts of the Lords Auditors of Causes and Complaints, ed. T. Thomson (Edinburgh, 1839).

Acts of the Lords of Council in Civil Causes, ed. T. Thomson (Edinburgh, 1839).

Acts of the Lords of Council in Civil Causes 1496-1501, ed. G. Neilson and H.M. Paton (Edinburgh, 1918).

Acts of the Lords of Council Volume III, 1501-1503, eds. A.B. Calderwood & A.L. Murray (Edinburgh, 1993).

Acts of the Lords of Council in Public Affairs 1501-1554, ed. R.K. Hannay (Edinburgh, 1932).

The Acts of the Parliament of Scotland, eds. T. Thomson & C. Innes (Edinburgh, 1882-1914).

Court Book of the Barony of Carnwath 1523-1542, ed. W.C. Dickinson (Scottish History Society, 1937).

Thomas Craig, *Jus Feudale* (Edinburgh and London, 1655; Leipzig, 1716; Edinburgh, 1732), trans. J.A. Clyde (Edinburgh, 1934).

Discours Particulier d'Ecosse 1559/60', ed. P.G.B. McNeill in *Miscellany II*, ed. W.D.H. Sellar (Stair Society, Edinburgh, 1984).

Habakkuk Bisset's Rolment of Courtis, vol. iii, ed. P.J. Hamilton-Grierson (Scottish Text Society, Edinburgh, 1926).

Historical Manuscripts Commission Report on the Manuscripts of Colonel David Milne Home of Wedderburn Castle (London, 1902).

- Robert Keith, *The History of the Affairs of Church and State from the beginning of the Reformation...to 1568*, eds. J.P. Lawson and C.J. Lyon (3 vols., Spottiswoode Society, Edinburgh, 1844-50).
- The Practicks of Sir James Balfour of Pittendreich*, ed. P.G.B. McNeill (2 vols., Stair Society, Edinburgh, 1962-63).
- Regality of Dunfermline Court Book 1531-1538*, ed. J.M. Webster and A.A.M. Duncan (Dunfermline, 1953).
- Sheriff Court Book of Fife 1515-1522*, ed. W.C. Dickinson (Scottish History Society, 1928).
- J. Skene, *De Verborum Significatione* (Edinburgh, 1597).
- Statutes of the Scottish Church, 1225-1559. Being a translation of Concilia Scotiae Ecclesiae Scoticanae Statuta...with Introduction and notes by David Patrick* (Scottish History Society, Vol. 54, Edinburgh, 1907).

Secondary Sources

(1) Reference

- D. Brunton & D. Haig, *The Senators of the College of Justice* (Edinburgh, 1832).
- Guide to the National Archives of Scotland* (Edinburgh, 1996).
- W.M. Morison, *The Decisions of the Court of Session...in the form of a Dictionary* (Edinburgh, 1801-6).
- The Scots Peerage*, ed. J.B. Paul (Edinburgh, 1904-14).

(2) Theses

- A.R. Borthwick, 'The King, Council and Councillors in Scotland c. 1430-1460' (Edinburgh University Ph.D., 1989).
- J.S. Cameron, 'Crown-Magnate Relations in the Personal Rule of James V, 1528-1542' (St. Andrews University Ph.D., 1994).
- T.M. Chalmers, 'The King's Council, Patronage and the Governance of Scotland 1460-1513' (Aberdeen University Ph.D., 1982).
- W.K. Emond, 'The minority of King James V, 1513-1528' (St. Andrews University Ph.D., 1988).
- P.G.B. McNeill, 'The Jurisdiction of the Scottish Privy Council 1532-1708' (Glasgow University Ph.D., 1961).
- H.L. MacQueen, 'Pleadable Brieves and Jurisdiction in Heritage in Later Medieval Scotland' (Edinburgh University Ph.D., 1985).
- I.E. O'Brien, 'The Scottish Parliament in the Fifteenth and Sixteenth Centuries' (Glasgow University Ph.D., 1980).

(3) Books

- J.H. Baker, *Introduction to English Legal History* (3rd ed., London, 1990).
- C. Bingham, *James V* (London, 1971).

- J.M. Brown (ed.), *Scottish Society in the Fifteenth Century* (London, 1977).
- K.M. Brown, *Bloodfeud in Scotland* (Edinburgh, 1986).
- R.C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992).
- P. Cane, *An Introduction to Administrative Law* (2nd edition, Oxford, 1992).
- T.M. Cooper, *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944).
- R.A. Dodgshon, *Land and Society in Early Scotland* (Oxford, 1981).
- G. Donaldson, *Scotland: James V to James VII*, (Edinburgh, 1965).
- D.E. Easson, *Gavin Dunbar* (Edinburgh, 1947).
- A. Grant, *Independence and Nationhood: Scotland 1306-1469* (London, 1984).
- B. Guenée, *States and Rulers in Later Medieval Europe*, (Oxford, 1985).
- R.K. Hannay, *The College of Justice* (Edinburgh, 1933), re-issued as *The College of Justice and other essays*, ed. H.L. MacQueen (Edinburgh, Stair Society, 1990).
- R.L.C. Hunter, *The Law of Arbitration in Scotland* (Edinburgh, 1987).
- J.A. Inglis, *Sir Adam Otterburn of Redhall* (Glasgow, 1935).
- M. Lynch, *Scotland, A New History* (London, 1991).
- L.J. Macfarlane, *William Elphinstone and the Kingdom of Scotland 1431-1513* (Aberdeen, 1985).
- H.L. MacQueen *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993).
- R. Nicholson, *Scotland: The Later Middle Ages* (Edinburgh, 1974).
- S.L. Ollivant, *The Court of the Official in Pre-Reformation Scotland* (Edinburgh, Stair Society, 1982).
- G.C.H. Paton (ed.), *An Introduction to Scottish Legal History* (Stair Society, Edinburgh, 1958).
- R.S. Rait, *The Parliaments of Scotland* (Glasgow, 1924).
- O.F. Robinson, W.M. Gordon, & T.D. Fergus, *An Introduction to European Legal History* (1st ed., Milton Keynes, 1985).
- M.H.B. Sanderson, *Cardinal of Scotland: David Beaton, c.1494-1546* (Edinburgh, 1986).
- M.H.B. Sanderson, *Scottish Rural Society in the Sixteenth Century* (Edinburgh, 1982).
- Sources and Literature of Scots Law*, various authors (Edinburgh, Stair Society, 1936).
- I.D. Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh, Stair Society, 1966).
- J.M. Wormald, *Court, Kirk and Community: Scotland 1470-1625* (London, 1981).
- J.M. Wormald, *Lords and Men in Scotland: Bonds of Manrent 1442-1603* (Edinburgh, 1985).

(4) Articles

- J.H. Baker, 'The Changing Concept of a Court', in J.H. Baker, *The Legal Profession and the Common Law. Historical Essays* (London, 1986).

- R. Black, 'A historical survey of delictual liability in Scotland for personal injuries and death', *The Comparative and International Law Journal of Southern Africa* viii (1975), p.53.
- A.R. Borthwick, 'Montrose v. Dundee and the jurisdiction of the Parliament and Council over fee and heritage in the mid-fifteenth century' in *The Scots and Parliament* ed. C. Jones (Edinburgh, 1996), p.33.
- A. L. Brown, 'The Scottish 'establishment' in the later fifteenth century', *Juridical Review* xxiii (1978), p89.
- R.C. van Caenegem, 'History of European Civil Procedure', *International Encyclopedia of Comparative Law*, ed M. Cappelletti (Tubingen, 1973), vol.xvi, 2.19.
- J.W. Cairns, T.D. Fergus and H.L. MacQueen, 'Legal Humanism in Renaissance Scotland', *Journal of Legal History* 11 (1990), p.40.
- M.T. Clanchy, 'Law and Love in the Middle Ages', in *Disputes and Settlements*, ed. J. Bossy (Cambridge, 1983).
- T.M. Cooper, 'Freehold in Scots Law', *Juridical Review* lvii (1945), p.1.
- W.C. Dickinson, 'Freehold in Scots Law', *Juridical Review* lvii (1945), p.135.
- A.A.M. Duncan, 'The Central Courts before 1532', in *An Introduction to Scottish Legal History* (Stair Society, Edinburgh, 1958), p.321.
- A.A.M. Duncan, 'James I, 1424-1437', *Glasgow University Scottish History Department Occasional Papers* (2nd ed., 1985).
- A.A.M. Duncan and M.P. McDiarmid, 'Some Wrongly Dated Entries in the Acts of the Lords of Council', *Scottish Historical Review* 33 (1954), p.86.
- W.M Gordon, 'The Acts of the Scottish Lords of Council: Records and Reports', in *Law Reporting in Britain*, ed. C. Stebbings (London, 1995), p.55.
- G.L. Gretton, 'The Feudal System', in K.G.C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996), p.51.
- P.J. Hamilton-Grierson, 'The Appellate Jurisdiction of the Scottish Parliament', *Scottish Historical Review* xv (1918), p.205.
- P.J. Hamilton-Grierson, 'Falsing the Doom', *Scottish Historical Review* xxiv (1926), p.1.
- R.K. Hannay, 'On the Foundation of the College of Justice', *Scottish Historical Review* (1918), vol. xv, p.30.
- R.K. Hannay, 'On the Church Lands at the Reformation', *Scottish Historical Review* xvi (1919), p.52.
- R.K. Hannay, 'On the Antecedents of the College of Justice', *The Book of the Old Edinburgh Club* XI (1922), pp.87-123, reprinted in *The College of Justice and other essays*, ed. H.L. MacQueen (Edinburgh, Stair Society, 1990), p.179.
- R.K. Hannay, 'Early Records of Council and Session, 1466-1659', in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, Edinburgh, 1936), p.16.
- R.K. Hannay, *The Early History of the Scottish Signet* (Edinburgh, 1936), re-printed in *The College of Justice and other essays*, ed. H.L. MacQueen (Edinburgh, Stair Society, 1990).
- A. Harding, 'The medieval brieves of protection and the development of the common law', *Juridical Review* xi (1966), p.115.

- A. Harding, 'Regiam Majestatem Amongst Medieval Law Books', *Juridical Review* (1984), p.97.
- G.L. Harriss, 'Political Society and the Growth of Government in Late Medieval England', *Past and Present* 138 (1993), p.28.
- H. McKechnie, 'Judicial Process Upon Brieves', (23rd David Murray Lecture, Glasgow, 1956).
- P.G.B. McNeill, 'Senators of the College of Justice 1532-1578', *Juridical Review* xxiii (1978), p.209.
- H.L. MacQueen, 'The Brieve of Right in Scots Law', *Journal of Legal History* iii (1982), p.52.
- H.L. MacQueen, 'Jurisdiction in heritage and the Lords of Council and Session after 1532', in *The Miscellany of the Stair Society* ii, ed. W.D.H. Sellar, (Edinburgh, 1984), p. 82.
- H.L. MacQueen, 'Pleadable brieves, pleading, and the development of Scots law', *Law and History Review* iv (1986), p.410.
- H.L. MacQueen, 'Introduction' to *The College of Justice: Essays by R.K. Hannay* (Stair Society, Edinburgh, 1990), p.iii.
- H.L. MacQueen & A.R. Borthwick, 'Three fifteenth-century cases', *Juridical Review* xxxi (1986), p.123.
- R.M. Maxtone Graham, 'Showing the Holding', *Juridical Review* ii (1957), p.251.
- A.L. Murray, 'Sinclair's Practicks' in *Lawmaking and Lawmakers in British History*, ed. A. Harding (Royal Historical Society, London, 1980), p.90.
- A.L. Murray, 'Financing the Royal Household - James V and his Comptrollers', in I.B. Cowan & D. Shaw (ed.) *The Renaissance and Reformation in Scotland* (Edinburgh, 1983), p.41.
- A.L. Murray, 'Exchequer, Council and Session, 1513-1542', in *Stewart Style 1513-1542, Essays on the Court of James V*, ed. J. Hadley Williams (East Linton, 1996) p.97.
- E. Powell, 'Arbitration and the Law in England in the Later Middle Ages', *Transactions of the Royal Historical Society*, xxxiii (1983), p.49.
- E. Powell, 'Settlement of Disputes by Arbitration in Fifteenth-century England', *Law and History Review* ii (1984), p.21.
- I. Rowney, 'Arbitration in Gentry Disputes of the Later Middle Ages', *History* lxxvii (1982), p.367.
- W.D.H. Sellar, 'The Common Law of Scotland and the Common Law of England', in *The British Isles 1100-1500*, ed. R.R. Davies (Edinburgh, 1988), p.83.
- W.D.H. Sellar, 'A Historical Perspective', in *The Scottish Legal Tradition*, ed. S. Styles (Edinburgh, 1991), p.29.
- D.B. Smith, 'Court of Session Districts', *Juridical Review* vii (1962), p.252.
- P.G. Stein, 'The College of Judges at Pavia', *Juridical Review* lxi (1952), p.204.
- P.G. Stein, 'The Source of the Romano-canonical Part of *Regiam Majestatem*', *Scottish Historical Review*, xlvi (1969), p.107.
- P.G. Stein, 'The Procedural Models of the Sixteenth Century', *Juridical Review* xxvii (1982), p.186.
- P.G. Stein, 'Common Law and Civil Law in historical perspective', *Zeitschrift für Europäisches Privatrecht* v (1997), p.385.

J.M. Wormald, 'Bloodfeud, Kindred and Government in Early Modern Scotland',
Past and Present, no.87 (1980), p.54.

J.M. Wormald, 'The Sandlaw Dispute', in *The Settlement of Disputes in Early
Medieval Europe*. ed. W. Davies and P. Fouracre (Cambridge, 1986), p.191.